92-1291

CASE NO.

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST P. FROHLICH,
PETITIONER,

VS.

THE STATE OF ARIZONA,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE PIMA COUNTY CONSOLIDATED JUSTICE
COURT FOR THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

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pro-per

56 pp

QUESTIONS PRESENTED FOR REVIEW

1. CAN THE LOWER COURTS ENFORCE AND UPHOLD A CONVICTION WHILE OPENLY AND BLATANTLY VIOLATING PROPER SEARCH AND SEIZURE, PURSUANT TO THE EXCLUSIONARY RULE, THE MIRANDA DOCTRINE?

2. CAN A LOWER COURT DENY A MOTION TO SUPPRESS EVIDENCE OBTAINED IN DIRECT VIOLATION OF THE EXCLUSIONARY RULE, THE MIRANDA DOCTRINE, AND USE THAT TAINTED EVIDENCE TO GAIN A CONVICTION, AND THEN ENFORCE AND UPHOLD THAT CONVICTION?

3. CAN THE LOWER COURTS FORCE INADEQUATE COUNSEL UPON AN ACCUSED PERSON, WHEN HE HAS TIMELY OBJECTED AND DEMANDED COUNSEL OF CHOICE, AND THEN UPHOLD THAT CONVICTION?

4. CAN THE LOWER COURTS, WITH JUDICIAL KNOWLEDGE, CHARGE AND CONVICT A PERSON WHILE OPENLY AND BLATANTLY VIOLATING AND DENYING DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW?

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ARIZONA REVISED STATUTE 28-181

ARIZONA REVISED STATUTE 28-1053

ARIZONA RULES OF THE COURT RULES OF CRIMINAL PROCEDURE 26.10

ARIZONA RULES OF THE COURT RULES OF CRIMINAL PROCEDURE 26.11

ARIZONA RULES OF THE COURT RULES OF CRIMINAL PROCEDURE 30.3

ARIZONA RULES OF THE COURT RULES OF CRIMINAL PROCEDURE 31.10

28 U.S.C. 1443 CIVIL RIGHTS CASES

LIST OF ALL CHARACTERS IN THIS CASE

PETITIONER/ACCUSED ..... ERNEST FROHLICH

JUDGES IN THIS CASE

ARRAIGNMENT ..... HON JUDGE GIBSON

MOTION HEARING ..... HON JUDGE GIRARD

TRIAL JUDGE..... HON JUDGE DONFELD

ATTORNEYS

PROSECUTOR..... MS. WANDA DAY

COURT APPOINTED COUNSEL .. MR. DAVID BRUCE

WITNESS FOR PROSECUTOR

ARRESTING OFFICER ..... MR. MADDEN

ASSISTING ON ARREST..... MR. MANNING

TRANSPORTING OFFICER ..... MR. RANKIN

OTHER OFFICERS IN ARREST REPORTS

JAIL OFFICER ..... MR. STREET

JAIL OFFICER ..... MR. HECKLER

JAIL OFFICER..... MR. SHARP

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PETITION FOR WRIT OF CERTIORARI

PETITIONER ERNEST FROHLICH RESPECFULLY ASKS THAT A WRIT OF CERTIORARI BE ISSUED TO REVIEW THE JUDGMENT OF ARIZONA SUPREME COURT OF APPEALS ENTERED ON AUGUST 10, 1992.

CITATION OF OPINION

ON MAY 8, 1992, A PETITION FOR REVIEW WAS FILED WITH THE ARIZONA SUPREME COURT UNDER CR-92-0213-PR, HEREIN EXIBIT O, PAGE 25 OF APPENDIX. THE ORDER OF THE ARIZONA SUPREME COURT WAS A PETITION FOR REVIEW, DENIED ON AUGUST 10, 1992. ON AUGUST 24, 1992, A MOTION FOR RECONSIDERATION WAS FILED WITH THE ARIZONA SUPREME COURT, ON SEPTEMBER 10, 1992, THE CLERK OF THE ARIZONA SUPREME COURT RESPONDED UNDER RULE 31.18 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE, CONSEQUENTLY "YOUR DOCUMENT SHALL NOT BE FILED IN THIS CASE, NOR PROCESSED." EXHIBIT P, PAGE 26 OF APPENDIX. THE PETITIONER CITES THE 4TH, 5TH AND 6TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS AUTHORITY FOR WHY THIS COURT HAS JURISDICTION TO HEAR HIS CASE. UNDER TITLE 28 SEC 1443, PETITIONER IS NOW REQUESTING THIS HONORABLE COURT, THE LAST COURT OF RESORT, TO

USE ITS DISCRETIONARY JURISDICTION TO REVIEW THIS ONGOING ACTIVE CASE FOR THE FOLLOWING REASONS:

(1) CONSTITUTIONAL RIGHTS VIOLATIONS BY THE LOWER COURTS .

(2) THE FACT THAT NO ARIZONA APPELLATE COURTS WILL RULE ON THE CONSTITUTIONAL RIGHTS VIOLATIONS.

(3) ALL OF THE QUESTIONS PRESENTED ARE SPECIAL AND IMPORTANT CONSTITUTIONAL PROVISIONAL ISSUES AND MUST BE ADDRESSED, AND THAT'S THE REASON FOR REQUESTING THE GRANTING OF THIS WRIT.

THE COURT HAS JURISDICTION IN THIS CASE UNDER TITLE 28, UNITED STATES CODE, 1443 CIVIL RIGHTS CASES.

ANY OF THE FOLLOWING CIVIL ACTIONS OR CRIMINAL PROSECUTIONS, COMMENCED IN A STATE COURT MAY BE REMOVED BY THE DEFENDANT TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT AND DIVISION EMBRACING THE PLACE WHEREIN IT IS PENDING.

1. AGAINST ANY PERSON WHO IS DENIED OR CANNOT ENFORCE IN THE COURT OF SUCH STATE A RIGHT UNDER ANY LAW PROVIDING FOR THE EQUAL CIVIL RIGHTS OF CITIZENS OF THE UNITED STATES, OR OF ALL PERSONS WITHIN THE JURISDICTION THEREOF;

2. FOR ANY ACT UNDER COLOR OF AUTHORITY DERIVED FROM ANY LAW PROVIDING FOR EQUAL RIGHTS, OR FOR REFUSING TO DO ANY ACT ON THE GROUND THAT IT WOULD BE INCONSISTENT WITH SUCH LAW.

STATEMENT OF CASE

ON THE EVENING OF MAY 25, 1990 AT APPROX. 8:00 P.M. ON KINNEY ROAD, PASSING THROUGH TUCSON MOUNTAIN PARK IN PIMA COUNTY, ARIZONA, PETITIONER WAS STOPPED BY RANGER KEVIN W. MADDEN, EMPLOYED BY THE PIMA COUNTY PARKS AND RECREATION DEPARTMENT. IT'S TO BE NOTED THAT THIS IS A TWO LANE, POSTED NARROW, HILLY, DIPPY, WINDING AND MOUNTAINOUS PUBLIC HIGHWAY/ RIGHT OF WAY. (ALONG THAT SECTION OF COUNTY ROAD IT'S ONLY TEN FEET FROM THE CENTER LINE TO THE EDGE OF THE ROAD, WITH ONLY AN EIGHT-INCH SHOULDER. THERE ARE FEW PLACES TO PULL OFF THIS ROAD WITHOUT BEING IN THORNY BUSHES AND DESERT CACTI. THE PARK SERVICES HAS PURPOSELY PLANTED CACTUS AND DRIVEN STEEL POSTS ALONG BOTH SIDES OF THE ROAD TO STOP PEOPLE FROM PULLING OFF THE ROAD. A NORMAL PIMA COUNTY ROAD IS 12.5 FEET WIDE WITH AN 8-FOOT SHOULDER , WHICH THIS ROAD DOES NOT HAVE.) THE APPELLANT

DEMANDED TO KNOW THE REASON FOR THE STOP BECAUSE WE WERE THE ONLY CARS ON THE ROAD; THE RANGER AT FIRST REFUSED TO RESPOND. (APNDX. R, Pg. 34 T.T. 50, 1-6) THE PETITIONER, HAVING DONE NOTHING WRONG AND KNOWING THE RANGER HAD NO PROBABLE CAUSE TO STOP, INFORMED THE OFFICER OF THAT FACT. PETITIONER ASKED THE RANGER HIS INTENT AND PROBABLE CAUSE FOR THE STOP. THE RANGER REFUSED TO RESPOND WITH HIS REASON FOR THE STOP, SO THE PETITIONER THEN DEMANDED ALL OF HIS RIGHTS AND PLACED INTO EFFECT THE EXCLUSIONARY RULE. (APNDX. EX. R, Pg. 36-37 T.T. 75, 15-24) THE RANGER THEN FINALLY RESPONDED WITH "YOU RAN OFF THE ROAD, AND YOU WEAVED ACROSS THE CENTER LINE TWICE."

PETITIONER DENIED THE ALLEGATION AND CHARGE, AND ASKED THE RANGER IF HE WAS UNDER ARREST. THE RANGER'S RESPONSE WAS "NO". NOT MORE THAN A FEW MOMENTS LATER, WITHOUT ANY

VERBAL WARNING OR REASON, THE RANGER ABRUPTLY JERKED THE PETITIONER'S CAR DOOR OPEN SAYING "GET OUT OF THE CAR; YOU'RE UNDER ARREST," AND THE PETITIONER WAS PHYSICALLY AND MALICIOUSLY DRAGGED FROM THE CAR AND HANDCUFFED.

PETITIONER DURING STOP/ARREST, SEARCH AND SEIZURE AND AFTER ALLEGEDLY BEING MIRANDIZED, AGAIN INVOKED HIS RIGHTS UNDER THE EXCLUSIONARY RULE, (APNDX. Pg. 29/30 M.T. Pg. 19, 10-21) AND DEMANDED TO BE TAKEN BEFORE A MAGISTRATE, IN ACCORDANCE WITH A.R.S. 28-1053 (APNDX- EX. U Pg. 48-50). HE WAS REFUSED THAT RIGHT. WHEN A SECOND RANGER APPEARED, THE PETITIONER ASKED SEVERAL TIMES FOR BOTH THEIR NAMES AND BADGE NUMBERS. THE ONLY RESPONSE HE GOT FROM EITHER PARK RANGER WAS "EXERCISE YOUR RIGHT AND SHUT UP."

PETITIONER WAS THEN TRANSPORTED BY PIMA COUNTY SHERIFF'S DEPUTY RANKEN, TO PRETRIAL

SERVICES AT THE PIMA COUNTY JAIL IN TUCSON WHERE HE WAS THEN CHARGED WITH D.U.I AND SIX OTHER FALSE/STACKED CHARGES. PETITIONER WAS DENIED OTHER RIGHTS, LIKE THE USE OF A PHONE AND RIGHT TO COUNSEL, WHICH HAD BEEN CONSISTENTLY DEMANDED AT ALL TIMES. (MIRANDA DOCTRINE/ EXCLUSIONARY RULE).

RANGER MADDEN CAME TO GIVE AN INTOXILYZER TEST. THE PETITIONER INFORMED THE RANGER THAT HE'D TAKE THE TEST AS SOON AS HE HAD COUNSEL; THE RANGER REFUSED TO ALLOW ANY COUNSEL (APNDX. C, [b] Pg. 3 & 4) UNTIL AFTER THE TEST, IN DIRECT VIOLATION OF PETITIONER'S RIGHTS. (APNDX. Q Pg. 31 H.T. 22, 4-6) and [KUNZLER V. PIMA COUNTY, 154 AZ 568, 744 P.2nd 669 (1987).]

PETITIONER AT PRE-TRIAL SERVICES WAS TOLD THAT HE WOULD HAVE TO SIGN THE CITATIONS. THE PETITIONER AGAIN STATED HE NEEDED COUNSEL, AND WAS AGAIN DENIED THAT RIGHT. [ARS 28-1053]

AT THE JAIL DURING BOOKING, THE OFFICERS

STATED "WE NEED YOUR FINGERPRINTS," AND WHEN THE PETITIONER OBJECTED PURSUANT TO THE DAVIS vs. MISSISSIPPI DOCTRINE, HE WAS MALICIOUSLY ASSAULTED BY RANGER MADDEN, OFFICER STREET, OFFICER HECKLER AND OFFICER SHARP (APNDX. EX. X, PG. 52-55) OF THE PIMA COUNTY JAIL. HE WAS PHYSICALLY ABUSED AND BEATEN WITH MALICE AND FORETHOUGHT TO SURRENDER HIS FINGERPRINTS IN VIOLATION OF BOTH A JUDICIAL OFFICER'S SIGNED ORDER (PURSUANT TO DAVIS Vs. MISSISSIPPI-394 U.S. PG. 728,) and THEIR JAIL POLICY MANUAL, ID. UNIT PROCEDURES 05.05.00 #16.

ON MAY 26, 1990 AT ABOUT 4 P.M. AT THE PIMA COUNTY JAIL, VIA VIDEO CONFERENCE, THE PETITIONER WAS ALLEGEDLY ARRAIGNED. THERE IS NO TRANSCRIPT OF THAT ARRAIGNMENT. (APNDX. EX. A, Pg. 1).

ON JULY 12, 1990 IN THE JUSTICE COURT BEFORE THE HONORABLE JUDGE GIBSON, THE PETITIONER DEMANDED ALL OF HIS RIGHTS AGAIN AND WOULD NOT

WAIVE ANY OF HIS RIGHTS, INCLUDING BUT NOT LIMITED TO ASSISTANCE OF COUNSEL OF CHOICE. THE COURT RECORD IS VOID OF ANY APPLICATION FOR COUNSEL BASED UPON INDIGENCY, AS PETITIONER DID NOT QUALIFY. THE COURT SIMPLY APPOINTED COUNSEL FOR HIM AGAINST HIS WILL AND OVER HIS OBJECTIONS, IN VIOLATION OF HIS RIGHT TO DEFEND HIMSELF AND OF HIS RIGHT TO ASSISTANCE OF COUNSEL OF CHOICE. (APNDX. EX. B, Pg. 2) , (APNDX EX. D, Pg.6-7) and (APNDX. EX. Q, Pg. 28/29, M.T. Pg. 4, 5-7 & Pg. 5, 4-6).

ON AUGUST 16, 1990, THE APPELLANT FILED WITH THE PIMA COUNTY JUSTICE COURT AN ARRAIGNMENT AND PLEA FOR THE RECORD, IN WHICH HE DEMANDED HIS RIGHTS SECURED BY THE LAW OF THE LAND, THE U.S. CONSTITUTION, TO INCLUDE BUT NOT BE LIMITED TO THE RIGHT TO A 12 -MAN COMMON LAW TRAIL BY JURY.

ON SEPTEMBER 4, 1990 WITH JUDGE GIRARD PRESIDING, THE COURT RULED/FOUND THEY WOULD

ALLOW THE STOP, EVEN THOUGH THE STOP/SEARCH & SEIZURE DIDN'T COMPLY WITH AZ. STATE STATUTE OR PROBABLE CAUSE PURSUANT TO THE CARROLL et al V U.S. DOCTRINE, OR THE DELAWARE V. PROUSE DOCTRINE (APNDX EX. T [A.R.S. 28-161] Pg. 47) (APNDX. EX. V [A.R.S. 13-3884] Pg. 50). THE COURT FURTHER RULED/FOUND THAT THE PETITIONER'S MIRANDA RIGHTS WERE NOT VIOLATED. THE COURT BASED THAT ARBITRARY RULING UPON THE PREMISE THAT THE PETITIONER DIDN'T PROPERLY ASK FOR COUNSEL. (M.T. Pg. 64, 7-13).

ON THE DAY OF THE TRIAL, SEPTEMBER 11, 1990 WITH TRIAL JUDGE DONFELD PRESIDING, THE SUBJECT OF A WAIVER OF MIRANDA RIGHTS WAS AGAIN ADDRESSED, AND DENIED, BY THE COURT. (APNDX. EX. R, Pg. 42/43/44 T.T. Pg. 105, 23-25, & Pg. 106, 1-13). DURING TRIAL, A WITNESS FOR THE DEFENSE WAS CALLED BY THE COURT APPOINTED COUNSEL. COUNSEL CLAIMS TO HAVE SUBPOENED THE WITNESS BUT HAD IN FACT FAILED TO DO SO, THEREBY DENYING

THE ACCUSED HIS RIGHT TO A WITNESS IN HIS BEHALF. HAD PETITIONER BEEN ALLOWED THE RIGHT TO DEFEND HIMSELF AS HE'D ORIGINALLY DEMANDED (LEGAL RIGHT), THE WITNESS IN MY BEHALF WOULD'VE APPEARED BECAUSE HE WOULD'VE BEEN PROPERLY AND TIMELY SUBPOENED BY THE PETITIONER HIMSELF. AGAIN, COURT APPOINTED COUNSEL PROVED HIMSELF TO BE INEFFECTIVE AND NOT WORKING IN THE CLIENT'S BEST INTERESTS. ON THIS SAME DATE AS A RESULT OF THE NUMEROUS VIOLATIONS OF DUE PROCESS, I WAS TRIED BY A SIX-MAN ADVISORY PANEL, FOUND GUILTY AND WAS CONVICTED OF DRIVING UNDER THE INFLUENCE. THE PETITIONER THEN FILED FOR A POST-CONVICTION RELIEF OF THE JUDGMENT AND SENTENCE, PURSUANT TO RULE 32, FOR THE NUMEROUS VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

PETITONER HAS FILED MANY MOTIONS AT EACH AND EVERY STEP OF EVERY PROCEEDING, AND THE COURT HAS DENIED EACH AND EVERY MOTION AT EACH

AND EVERY STEP, CONSISTENTLY WITHOUT FAIL EACH AND EVERY DEMAND FOR AND REQUESTS FOR TRIAL DE NOVO, DUE PROCESS, APPEAL BRIEFS, MOTION HEARINGS, ORAL ARGUMENTS, YOU NAME IT, WERE DENIED BY THE COURT, EVEN IN VIOLATION OF THEIR OWN COURT ORDERS. (APNDX Y & Z, Pg. 55-58). APPEALS FILED WITH SUPERIOUR COURT, COURT OF APPEALS DIVISION 2, THE ARIZONA STATE SUPREME COURT, WERE ALL ALSO DENIED.

THIS PETITIONER IS NOW FORCED, BECAUSE OF SUBSTANTIAL DAMAGE (i.e. FINES/LOSS OF PROPERTY, CRIMINAL RECORD, INCARCERATION/LOSS OF FREEDOM) CAUSED HIM BY THE DENIAL OF HIS CONSTITUTIONALLY PROTECTED RIGHTS, TO APPEAL THIS CASE TO THE SUPREME COURT OF THE UNITED STATES, FOR REDRESS OF GRIEVANCE.

ARGUMENT

I.

THE COURT SHOULD REVIEW BECAUSE OF THE CONSTITUTIONAL RIGHTS VIOLATIONS OF THE EXCLUSIONARY RULE.

NO FOURTH AMENDMENT WARRANT AND NO PROBABLE CAUSE TO STOP.

THE LOWER COURTS DID ERR WHEN THEY RULED THAT THERE WAS PROBABLE CAUSE TO STOP. THERE WAS, IN FACT, NO EVIDENCE IN SUPPORT OF ARTICULABLE PROBABLE CAUSE IN ACCORDANCE WITH (DELAWARE V. PROUSE 440 U.S. 648, 1979), NOR ANY BREACH OF THE PEACE IN ACCORDANCE WITH (CARROLL ET AL. vs UNITED STATES 267 U.S. 132-175) Pg. 137 "NOT ONLY DOES A MISDEMEANOR HAVE TO BE COMMITTED IN THE PRESENCE OF THE OFFICER, BUT IN ADDITION, IT MUST BE A BREACH OF THE PEACE. STATE V. LUTZ SUPRA."

THE PARK RANGER DIDN'T HAVE ANY ARTICULABLE PROBABLE CAUSE TO STOP FOR THE FOLLOWING REASONS: MADDEN'S WRITTEN REPORTS AND HIS TESTIMONY ON THE WITNESS STAND ALLEGE THAT THE APPELLANT WENT OFF THE ROAD AND THEN ABRUPTLY CORRECTED. AT THE MATERIAL HEARING, HE STATED HE DIDN'T RECALL SEEING ANYTHING COME OUT FROM UNDERNEATH THE CAR EVEN THOUGH THERE IS NO SHOULDER, JUST DIRT, GRASS AND DESERT BRUSH. (APNDX. EX. Q Pg. 29, H.T. Pg.11 line13-15). WITH THAT STATEMENT, HE THEREBY FAILED TO SHOW ANY EVIDENCE OF THAT ALLEGED MOVEMENT. MADDEN'S REPORT STATED THAT THE APPELLANT CROSSED THE CENTER LINE JUST A SHORT WAY DOWN THE ROAD WITH JUST THE LEFT WHEELS OF THE CAR (APNDX. EX. R, Pg. 35,36 T.T. Pg. 68, line 19-25). THIS MOVEMENT IS IN COMPLIANCE WITH **A.R.S. 28-729 DRIVING *ON* ROADWAYS LANED FOR TRAFFIC**, *1. A vehicle shall be driven as nearly as practicable entirely within a single lane and shall

not be moved from that lane until the driver first ascertained that the movement can be made with safety. THE RANGER FAILED TO SHOW OR SUBSTANTIATE THAT THE MOVEMENT WAS NOT SAFE, SO HE CREATED A REASON FOR THAT STOP. THE FOLLOWING RESPONSE MADE BY MADDEN WHEN ASKED ON CROSS AS TO HOW FAR OVER THE CENTER LINE DID THE CAR CROSS, WAS: "JUST THE WHEELS," (APNDX. EX. Q, T.T. Pg. 68, 9-25). THROUGHOUT THE HEARING AND THE TRIAL AND IN ALL THE WRITTEN REPORTS OF RANGER MADDEN, THERE WAS NO MENTION MADE THAT THE SPEED OF THE VEHICLE WAS A FACTOR. MADDEN FURTHER STATES IN HIS REPORTS AND AT TRIAL, THAT AFTER FOLLOWING THE APPELLANT ABOUT 1.5 MILES ON THIS POSTED NARROW, WINDING, HILLY ROAD WITH DIPS, MADDEN THEN PROCEEDED TO STOP THE APPELLANT WHEN HE ALLEGEDLY CROSSED THE CENTER LINE WITH JUST HIS LEFT WHEELS A SECOND TIME. THE RANGER INDICATES AT (APNDX. EX. Q, Pg.

31 H.T. 28, 14-24), (APNDX. EX. O, Pg. 32/33, H.T. 34, 17-19), (APNDX. EX R, Pg. 35, T.T. 67, 23-25), (APNDX. EX. R, Pg. 36/37 T.T. 66,1-10). THIS IS, AGAIN, A POSTED NARROW, WINDING ROAD WITH HILLS AND DIPS. THEREFORE, SOME KIND OF MOVEMENT WOULD BE EXPECTED OF A VEHICLE EVEN WITHIN ITS LANE. MADDEN'S RESPONSE TO THE QUESTION "WAS IT DARK ENOUGH ON THIS PARTICULAR NIGHT TO OBSERVE ONCOMING TRAFFIC BY JUST THE HEADLIGHTS OF THE OTHER CARS ON THE ROAD?" WAS : "YES SIR". (APNDX. EX. R, Pg. 37, T.T. 69, 1-3). THE RANGER MADE THE STATEMENT (APNDX. EX. R, Pg. 34/35, T.T. 50, 4-6) THAT "WE WERE THE ONLY VEHICLES ON THE ROAD AT THAT TIME, AND THROUGHOUT THE TRIP I DO NOT RECALL ANY VEHICLES OTHER THAN OURS." FURTHERMORE, THESE PARTICULAR MOVEMENTS WERE FIRST ASCERTAINED BY PETITIONER TO BE SAFE BEFORE THEY WERE MADE, IN COMPLETE COMPLIANCE WITH A.R.S. 28-729. THEREFORE, THERE WAS NO

ARTICULABLE PROBABLE CAUSE NOR BREACH OF THE PEACE, AND NO REASON FOR THE STOP IN THIS INSTANT CASE. THE FOLLOWING CASES ILLUSTRATE THIS POINT:

IN EDWARDS vs. STATE, 462 So 2d 581 (Fla. 4th D.C.A. 1985), THE COURT FOUND THE DEFENDANT WAS SEEN CROSSING THE CENTER LINE THREE TO SEVEN TIMES, FORCING APPROACHING VEHICLES OFF THE ROAD, AND ALMOST HITTING A BRIDGE ABUTMENT. IN EDWARDS THE COURT FOUND THAT SUCH CONDUCT INVOLVED A BREACH OF THE PEACE.

IN ROMO vs. STATE, 577 S.W. 2d 251 (Tex. CR. App1979), THE SUSPECT WAS DRIVING ERRATICALLY AT SEVENTY M.P.H. IN A FIFTY-FIVE M.P.H. ZONE. THE SUSPECT'S VEHICLE WAS WEAVING ACROSS THE CENTER LINE AND ON THE SHOULDER OF THE ROAD. THESE FACTS READILY DISTINGUISH ROMO AND EDWARDS FROM THE CASE BEFORE THIS COURT, AND NONE OF THE ABOVE VIOLATIONS FROM THESE CASES APPEAR IN THIS INSTANT CASE.

FURTHERMORE, ANY ALLEGED VIOLATIONS OF THE ARIZONA TRAFFIC CODE BY THE APPELLANT AND OBSERVED BY THE PARK RANGER WERE **CIVIL VIOLATIONS** PURSUANT TO (APNDX. EX. T. Pg. 47/48) A.R.S. 28-181, AND NOT MISDEMEANORS WITHIN THE MEANING OF (APNDX. EX. V, Pg. 50/51) A.R.S. 13-3884. ONLY AFTER THE PARK RANGER MADE AN UNLAWFUL TRAFFIC STOP, SEARCH & SEIZURE (INVESTIGATION,) AND ARREST COULD HE HAVE **ALLEGED THAT** THE APPELLANT WAS DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR. IN THIS CASE BEFORE THIS COURT, THE RECORD SHOWS THERE WAS NO FOURTH AMENDMENT WARRANT, NOR ANY ARTICULABLE REASONABLE SUSPICION NOR ANY PROBABLE CAUSE TO STOP; THERE WAS NO BREACH OF THE PEACE NOR WAS THERE A MISDEMEANOR COMMITTED; THERE WAS NO CLEAR VIOLATION OR SUSPICION FOR A PROBABLE CAUSE TO STOP. THEREFORE, THIS COURT UPON REVIEW SHOULD GRANT THIS WRIT OF CERTIORARI.

II

THE COURT SHOULD REVIEW BECAUSE OF THE DISCRETIONARY AND MIS-APPLIED RULINGS BY THE LOWER COURTS REGARDING THIS PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS FROM THE TIME OF ARREST.

VIOLATION OF MIRANDA DOCTRINE

THE LOWER COURTS COMMITTED REVERSIBLE ERROR WHEN THEY DENIED THE APPELLANT'S MOTION TO SUPPRESS OR DISMISS FOR VIOLATION OF HIS CONSTITUTIONALLY PROTECTED RIGHTS (MIRANDA DOCTRINE). NOTE THE FOLLOWING:

RANGER MADDEN, AT THE MATERIAL HEARING WAS ASKED BY THE PROSECUTOR, MS. DAY, (SEE APNDX. EX. Q, Pg. 29/30, H.T. 19, 10-21) "DID YOU READ THE DEFENDANT HIS MIRANDA RIGHTS?" AND HIS RESPONSE WAS, "AT THAT TIME, NO, NOT UNTIL HE HAD BEEN SECURED; YES, HE WAS READ HIS MIRANDA

WARRANT AFTER WE HAD STOOD HIM UP BY THE VEHICLE". A FEW QUESTIONS LATER MS. DAY ASKED (APNDX. EX. Q, Pg. 30, H.T. 19, 19-21) "AND DID YOU ASK HIM IF HE WOULD WAIVE HIS MIRANDA RIGHTS?" THE RANGER'S RESPONSE WAS "I DID ASK THAT QUESTION AND **HE DID NOT**". YET DURING CROSS AT MATERIAL HEARING, (APNDX. EX. Q, Pg. 32, H.T. 33, 8-11) (SEE EX. X, Pg. 52-55) MADDEN ADMITTED THAT IN THE WRITTEN REPORT HE'D MADE OUT THE NIGHT OF THE ARREST, NO MENTION WAS MADE THAT THE OFFICERS HAD GIVEN THE DEFENDANT HIS MIRANDA RIGHTS. ON THE TYPED REPORT MADE THE FOLLOWING DAY, HOWEVER, IT APPEARS (APNDX. EX. X, Pg. 52-55) THE RANGER STATES SEVERAL TIMES THAT HE COULDN'T REMEMBER THE APPELLANT EVER ASKING FOR COUNSEL. (APNDX. EX. Q, Pg. 30/31, H.T. 21/22, 17-6) & (APNDX. EX. Q, Pg. 32, H.T. 30, 21). MADDEN ADMITTED THAT AT THE TIME HE ASKED THE APPELLANT TO TAKE THE BREATH TEST, (APNDX. EX. Q, Pg. 30/31, H.T. 22, 4-6) "HE INDICATED TO ME

VERBALLY OR HE REFUSED TO TAKE THE TEST, STATING THAT WE WOULD BE ILLEGALLY TAKING EVIDENCE WITHOUT AN ATTORNEY."

THE MIRANDA vs. ARIZONA DOCTRINE IS QUITE SPECIFIC, AND PLACES THE BURDEN OF THE ISSUE OF COUNSEL ON THE PLAINTIFF, NOT ON A REQUEST BY THE ACCUSED. (IN CARNLEY V. COCHRAN, 369 U.S 506, 513 (1962), IT IS STATED "IT IS SETTLED THAT WHERE THE ASSISTANCE OF COUNSEL IS A CONSTITUTIONAL REQUISITE, THE RIGHT TO BE FURNISHED COUNSEL DOES NOT DEPEND ON A REQUEST. THIS PROPOSITION APPLIES WITH EQUAL FORCE IN THE CONTEXT OF PROVIDING COUNSEL TO PROTECT AN ACCUSED'S FIFTH AMENDMENT PRIVILEGE IN THE FACE OF INTERROGATION. ALTHOUGH THE ROLE OF COUNSEL AT TRIAL DIFFERS FROM THE ROLE DURING INTERROGATION, THE DIFFERENCES ARE NOT RELEVANT TO THE QUESTION WHETHER A REQUEST IS A PREREQUISITE." MIRANDA Pg. 471: "PRESUMING WAIVER FROM A SILENT RECORD

IS IMPERMISSIBLE. THE RECORD MUST SHOW, OR THERE MUST BE AN ALLEGATION AND EVIDENCE WHICH SHOW THAT AN ACCUSED WAS OFFERED COUNSEL, BUT INTELLIGENTLY AND UNDERSTANDINGLY REJECTED THE OFFER. ANYTHING LESS IS NOT WAIVER." (MIRANDA Pg. 475).

ANOTHER QUESTION ASKED MADDEN WAS "MY SPECIFIC QUESTION IS: DO YOU HAVE ANYTHING IN WRITING THAT SAYS THE ACCUSED WAIVED COUNSEL?" THE RANGER'S RESPONSE WAS "NO". (APNDX. EX. R, Pg. 38/39, T.T. 78, 21-25.) ANOTHER QUESTION ASKED OF RANGER MADDEN: "WAS THERE ANY REASON NOT TO ALLOW THE ACCUSED TO CALL COUNSEL THAT NIGHT?" AND THE RANGER'S RESPONSE WAS "HE NEVER ASKED." (APNDX. EX. R, Pg. 38/39, T.T. 78, 24-25 and T.T. 79,1).

THE RECORD SHOWS THAT AT THE VERY BEGINNING THE APPELLANT WAS ALLEGEDLY GIVEN HIS MIRANDA RIGHTS. THE RANGER'S STATEMENT WAS **THAT APPELLANT DID NOT WAIVE THEM,**

(APNDX. EX. Q, Pg 30 H.T. 19, 19-21). THE RECORD IS VOID OF ANY WAIVER. THE JUSTICE COURT THEN COMMITTED REVERSIBLE ERROR BY DENYING AND RULING THAT THE PETITIONER'S MIRANDA RIGHTS WERE NOT VIOLATED. THE COURT BASED THAT ARBITARY RULING ON THE PREMISE THAT THE PETITIONER DID NOT PROPERLY ASK FOR COUNSEL, (APNDX. EX. Q, Pg. 33, M.T. Pg. 64, 7-13). THE APPELLANT'S MOTION TO SUPPRESS OR DISMISS FOR DENIAL OF COUNSEL AT ALL STAGES OF THE INVESTIGATION WAS DENIED. THE LOWER COURTS FURTHER VIOLATED THE ACCUSED'S RIGHTS BY USING THE DENIAL TO TAKE THE INTOXILYZER WITHOUT COUNSEL, WHICH WAS USED AS EVIDENCE AGAINST HIM AT TRIAL. THE STATE'S OWN CASES SHOW IN (KUNZLER V PIMA COUNTY, 154 AZ 568, 744 P.2nd 669, (1987)) THAT IN ALL CRIMINAL DWI PROCEEDINGS, THE DEFENDANT ALWAYS HAS THE RIGHT TO CONTACT A LAWYER BEFORE THE BREATH TEST, AS LONG AS THERE IS NO DISRUPTION OF THE

INVESTIGATION. THE REMEDY IN THIS CASE SHOULD'VE BEEN DISMISSAL, PURSUANT TO STATE V. HOLLAND 147 ARIZ. 453 (1985) McNUTT V. SUPERIOR Ct. 133 ARIZ 7, (1982).

JUDGE DONFELD DID ERR WHEN HE MADE THE STATEMENT, "WELL LET ME LAY ALL OF THAT TO REST FOR YOUR CLIENT. YOU KNOW THE LAW AS WELL AS I DO. MR. FROHLICH, LISTEN VERY CAREFULLY. THE LAW DOES NOT REQUIRE A WRITTEN WAIVER OF MIRANDA RIGHTS. (APNDX. EX. R, T.T. Pg. 42-45, T.T. 105, 23-25 and 106, 1-13) "THAT'S NUMBER ONE". -----AND THE JUDGE GOES ON TO SAY " SO MIRANDA REALLY DOESN'T APPLY IN THIS CASE."

THE APPELLANT'S RESPONSE TO THAT STATEMENT WAS "I'LL HAVE TO OBJECT ON THAT FINDING, YOUR HONOR. I BELIEVE MIRANDA DOES APPLY, BECAUSE IT'S NOT ONLY QUESTIONS AND ANSWERS, IT'S EVIDENCE, AND IN THIS CASE THEY'RE USING THAT DENIAL TO TAKE THE BREATHOLYZER WITHOUT COUNSEL AS EVIDENCE, AND THEREFORE IT

DOES FALL UNDER MIRANDA." (APNDX. EX. R, Pg. 42/43 T.T.106, 1-13). THE RECORD PLAINLY SHOWS THAT THE PETITIONER DID DEMAND COUNSEL FROM THE ONSET AND IN ADDITION, APPELLANT DEMANDED OTHER RIGHTS AND THAT MADDEN CONVENIENTLY IGNORED OR DIDN'T REMEMBER SPECIFICALLY WHICH RIGHTS THE PETITIONER HAD DEMANDED. (APNDX. EX. R, Pg. 37/38, T.T. 75, 15-24) (APNDX. EX. R, Pg. 39,/40, T.T. 79, 22-25 and Pg. 80, 1-3).

THE FACTUAL EVIDENCE IN THE RECORD CLEARLY PROVES THAT THE PETITIONER DEMANDED MANY RIGHTS INCLUDING MIRANDA AND THAT THE OFFICERS AND COURTS ERRED IN THEIR DENIALS AND RULINGS ON THESE VIOLATIONS. AS THE RECORDS AND EVIDENCE QUITE CLEARLY SHOWS THE COURTS' DISCRETIONARY DECISIONS ARE IN VIOLATION OF THE PETITIONER'S RIGHTS AND SHOULD BE REVIEWED AND THOSE ARBITRATORY AND CAPRICIOUS DISCRETIONARY DECISIONS OVERTURNED.

III.

THE COURT SHOULD REVIEW BECAUSE THE ISSUE OF RIGHT TO ASSISTANCE OF COUNSEL OF CHOICE WAS CONSISTENTLY DENIED FROM THE VERY BEGINNING.

THE PETITIONER CLEARLY AND CONSISTENTLY, FROM THE BEGINNING, RAISED THE ISSUE OF COUNSEL. FROM THE STOP/ARREST/SEARCH AND SEIZURE, THROUGH THE TRIAL AND THREE APPEALS, THE PETITIONER'S DEMANDS FOR ASSISTANCE OF COUNSEL OF CHOICE PURSUANT TO THE EXCLUSIONARY RULE (APNDX. R, Pg. 36-37, T.T. 75, 15-24) & (APNDX. R, Pg. 38, T.T. 78-79, 21-1) WERE REFUSED AND DENIED BY OFFICERS AND COURTS ALIKE. THE JUSTICE COURT COMMITTED REVERSIBLE ERROR BY APPOINTING FORCED INADEQUATE/ INEFFECTIVE COUNSEL AGAINST HIS WILL AND OVER HIS OBJECTIONS (APNDX. EX. B, Pg. 2). THIS APPELLANT DEMANDED COUNSEL OF CHOICE,

OBJECTING TIMELY AND SPECIFICALLY SEVERAL TIMES TO COURT APPOINTED COUNSEL. THE COURT DENIED MY MOTION FOR COUNSEL OF CHOICE (APNDX. EX. D, Pg. 6-7) & (APNDX. Q, M.T. Pg. 4, 5-7 & M.T. Pg. 5, 4-6). THE PETITIONER WAS AWARE THAT A "LACK OF COUNSEL OF CHOICE CAN BE CONCEIVABLY EVEN WORSE THAN NO COUNSEL AT ALL, OR HAVING TO ACCEPT COUNSEL BEHOLDEN TO ONE'S ADVERSARY" (BURGETT V. TEXAS, 389 U.S. 109). THE RECORD IS VOID OF ANY STATED REASON FOR COURT APPOINTED COUNSEL AND THE RECORD CLEARLY SHOWS THAT THIS APPELLANT DID OBJECT TO THAT COUNSEL. THIS IS NOT LIMITED TO THE FACT THAT THE APPELLANT DID NOT QUALIFY FOR INDIGENCY (JUSTICE COURT ORD. 7/12/90, APNDX. EX. B, Pg. 2) & #2 CRIMINAL LAW 641.1: "COUNSEL," IN PURVIEW OF SIXTH AMENDMENT, IS NOT NECESSARILY LIMITED TO ONLY PERSONS WHO ARE LICENSED BY SOME STATE TO PRACTICE LAW." U.S.C.A. CONST. AMEND.6.

STOCKHEIMER V U.S. 385 Fd 979 (1974) pg. 980.

THE JUSTICE COURT NOT ONLY APPOINTED **INADEQUATE AND INEFFECTIVE COUNSEL** OVER THE APPELLANT'S OBJECTION, BUT THAT COUNSEL PROVED TO BE DETRIMENTAL TO THE ACCUSED AND HIS CASE FOR THE FOLLOWING:

THE MOTION TRANSCRIPT SHOWS THAT WITNESS OFFICER RANKIN WAS NOT CALLED ON BEHALF OF THE ACCUSED TO TESTIFY AT THE MOTION HEARING, EVEN THOUGH HE'D BEEN SUBPOENAED BY THE COURT APPOINTED COUNSEL FOR THAT MOTION HEARING AND WAS PRESENT IN THE COURT ROOM. THE RECORD CLEARLY SHOWS THAT THE COURT APPOINTED COUNSEL, AT TRIAL, WAS READY TO CALL THAT WITNESS ON BEHALF OF THE ACCUSED, BUT SOMEHOW HAD FAILED TO SUBPOENA OFFICER RANKIN FOR THE TRIAL TESTIMONY. (APNDX. EX. R, Pg. 39-42, T.T. Pg. 95, 9-23 and T.T. Pg. 96, 4-15 and T.T. Pg. 100, 17-25) THEREFORE, THE ACCUSED WAS DENIED HIS ONLY EXCULPATORY WITNESS TO TESTIFY IN HIS BEHALF.

THE RECORD CLEARLY SHOWS THAT THE COURT IGNORED REPEATED REQUESTS BY THE APPELLANT FOR ASSISTANCE OF COUNSEL OF CHOICE, AS IT DENIED THE APPELLANT'S NOTICE AND DEMAND RIGHT TO COUNSEL, AND ALSO DELIBERATELY APPOINTED COUNSEL OVER THE APPELLANT'S CONTINUED OBJECTIONS. (APNDX. D, Pg 6.)

IV.

THE COURT SHOULD REVIEW BECAUSE OF THE BRAZEN INDIFFERENCE AND DEPRIVATION OF DUE PROCESS BY THE LOWER COURTS.

THE PETITIONER HAS BEEN DEPRIVED OF ALL RIGHTS WHICH ARE OF SUCH FUNDAMENTAL IMPORTANCE AS TO REQUIRE COMPLIANCE WITH THE DUE PROCESS STANDARDS OF FAIRNESS AND JUSTICE. THE LAW IS COMPRISED OF LEGAL PROCEEDINGS ACCORDING TO THOSE RULES AND PRINCIPLES WHICH HAVE BEEN ESTABLISHED IN OUR SYSTEMS OF JURISPRUDENCE FOR THE ENFORCMENT AND PROTECTION OF PRIVATE RIGHTS. DUE TO THE LIMITATION OF PAGES HEREIN, THE FOLLOWING ARE THE HIGHLIGHTS OF THE DUE PROCESS VIOLATIONS COMMITTED BY THE OFFICERS AND THE COURTS IN THIS CASE:

1. THE APPELLANT DEMANDED AT THE TIME OF THE STOP/ARREST/ SEARCH & SEIZURE A FOURTH AMENDMENT WARRANT, PROBABLE CAUSE AND

COUNSEL, AND TO BE TAKEN BEFORE A MAGISTRATE UNDER A.R.S. 28-1053 (APNDX. EX. U, Pg. 48-50); THE OFFICER REFUSED. THIS WAS A CLEAR VIOLATION OF THE EXCLUSIONARY RULE (FOURTH AMENDMENT)

2. AT THE PRETRIAL SERVICES AT THE JAIL, THE PETITIONER DEMANDED AND WAS DENIED HIS DUE PROCESS (RIGHTS) OF COUNSEL (APNDX. EX. Q, M.T. Pg. 22, 4-6), KUNZLER V PIMA COUNTY, 154 AZ 568,744 P.2nd 669(1987) IN ALL CRIMINAL DWI PROCEEDINGS, THE DEFENDANT ALWAYS HAS THE RIGHT TO CONTACT A LAWYER BEFORE THE BREATH TEST, AS LONG AS THERE IS NO DISRUPTION OF THE INVESTIGATION, AS IN THIS CASE.

3. AT ARRAIGNMENT, THE APPELLANT DEMANDED THAT THE COURTS MAKE RECORDS OF ALL PROCEEDINGS, AND THE COURTS SIMPLY REFUSED, AGAIN DENYING THIS APPELLANT DUE PROCESS (RIGHTS.) (RIGHT TO HAVE A RECORD FOR APPEAL.)

4. PETITIONER FILED 25 MOTIONS BEFORE TRIAL,

DEMANDED MOTION HEARINGS, AND DEMAND ORAL ARGUMENTS AND ALL MOTIONS SUBMITTED BY PETITIONER WERE DENIED.

5. NOTICE AND DEMAND WAS GIVEN FOR A TRIAL BY JURY (12 MAN JURY AT THE COMMON LAW); THE APPELLANT WAS ONLY ALLOWED A BENCH TRIAL WITH A SIX-MAN ADVISORY PANEL. CONVICTION WAS GAINED BY THE LOSS OF DUE PROCESS (DENIAL OF THE COURT TO HEAR MOTIONS). NO EXCULPATORY OR TANGIBLE EVIDENCE WAS EVER PRODUCED, ONLY PURJUROUS/HEARSAY TESTIMONY WAS USED (BRISCOE et al Vs. LAHUE DOCTRINE, 460 U.S. 1983).

6. JUDGMENT AND SENTENCING:

ON OCTOBER 3,1990 IN THE JUSTICE COURT, JUDGE DONFELD PRONOUNCED THE SENTENCE AND FAILED TO COMPLY WITH C.R.P. 26.10 b (2) BY NOT TAKING INTO ACCOUNT THE TIME SERVED, AND FURTHER BY IMPOSING A GREATER JAIL SENTENCE THAN IS NORMAL IN A CRIME OF THIS TYPE. HE ALSO FAILED TO COMPLY WITH C.R.P. 26.11 c, BY

NOT HANDING THE DEFENDANT A WRITTEN NOTICE OF HIS RIGHTS OF APPEAL AND THE PROCEDURE HE MUST USE, A BRAZEN VIOLATION OF THE PETITIONER'S DUE PROCESS (RIGHTS) (APNDX. EX. S, a.b. Pg. 45).

7. THE JUSTICE COURT DENIED PETITIONER DUE PROCESS BY FAILING TO FOLLOW THEIR OWN PUBLISHED RULES OF PROCEDURE WHEN ALLOWING THIS APPEAL FOR THE FOLLOWING REASONS: (TIME/LATCHES)

AS PER RULE 30.3 PREPARATION OF RECORD, THE JUSTICE COURT FAILED TO TRANSMIT THE INCOMPLETE RECORD TO THE SUPERIOR COURT WITHIN THE TIME FRAME OF THE RULE. APPELLANT FILED HIS NOTICE OF APPEAL WITH THE JUSTICE COURT ON OCTOBER 3, 1990, (APNDX. EX. I, Pg.14-15) AND AS OF NOVEMBER 29, 1990, THE RECORDS WERE STILL NOT COMPLETED. (APNDX. EX. J, Pg. 15-19.) THE COURT RECORDS WERE NOT TIMELY (WITHIN 40 DAYS) TRANSFERRED FROM THE JUSTICE COURT TO THE SUPERIOR COURT. THE SUPERIOR COURT ERRED WHEN

IT DENIED TO RULE ON THE VIOLATION OF THESE RULES AT THE PRE-TRIAL CONFERENCE (APNDX. EX. J, Pg. 15-19) AND MOTION HEARING. EIGHT MONTHS LATER, THE COURT AGAIN DENIED TO RULE ON THESE RULE VIOLATIONS FOR THE THIRD TIME, EVEN IN VIOLATION OF THEIR OWN COURT ORDERS TO PROCEED IN A TIMELY MANNER. (APNDX. EXS. Y & Z, Pg. 56-58.)

RULE 31.10 FILING OF THE RECORD-- THE CLERK OF THE APPELLATE COURT VIOLATED THIS RULE AS SHOWN BY THE FOLLOWING: THE ORDER FROM THE HON JUDGE KELLY DATED OCT. 28,1991, "IT APPEARING THAT THE TRANSCRIPTS FROM THE JUSTICE COURT WERE FILED ON AUG 8, 1991"; SINCE THE APPELLANT WAS NOT NOTIFIED THAT THE RECORD WAS COMPLETE THIS IS THEN A VIOLATION OF RULE 31.10.

8. APPELLANT DEMANDED A TRIAL DE NOVA BECAUSE OF THE LOWER COURTS' VIOLATIONS: AN INCOMPLETE RECORD, LACK OF DUE PROCESS AND VIOLATIONS OF THE RULES OF PROCEDURE. THE

COURTS AGAIN DENIED THIS MOTION AND RIGHT. (APNDX. EX. J, Pg.15-19).

9. THE PETITIONER AT EVERY STEP OF THESE PROCEEDINGS HAS DEMANDED ORAL ARGUMENT FOR ALL MOTIONS SUBMITTED IN EVERY COURT, INCLUDING THE SUPREME COURT OF THE STATE OF ARIZONA. EVERY COURT AND JUDGE REFUSED AND DENIED TO ALLOW THE PETITIONER THE RIGHT TO EXPOUND ON HIS POSITION.

10. APPEAL TO SUPERIOR COURT - THE COURT FURTHER FINDS THAT THE DECISION OF THE JUSTICE OF THE PEACE WAS NOT ILLEGAL OR AN ABUSE OF DISCRETION, THEREFORE, IT IS ORDERED THAT THE JUDGEMENT OF THE JUSTICE COURT IS AFFIRMED. (APNDX. EX. L, Pg. 20-22)

11. APPEAL TO THE COURT OF APPEAL DIVISION TWO -- DENIED. THE COURT CLAIMED: NO JURISDICTION (APNDX. EX.N Pg 23-25).

12. APPEAL TO THE ARIZONA SUPREME COURT -- DENIED. (APNDX. EX. O, Pg. 25-26).

SUMMARY OF ARGUMENTS

I.

THE COURT SHOULD REVIEW, BECAUSE THE PETITIONER SEEKS REDRESS OF GRIEVANCE FOR THE SPECIFIC DENIALS OF HIS RIGHTS DURING STOP, SEARCH AND SEIZURE.

THE FACTS AND THE EVIDENCE IN THIS BRIEF SHOW THAT THE PETITIONER DEMANDED SPECIFIC RIGHTS UNDER THE EXCLUSIONARY RULE, (MIRANDA DOCTRINE), THAT THE OFFICERS AND THE COURTS SIMPLY IGNORED AND DENIED. THEY THEREBY ERRED WHEN MAKING THEIR RULINGS IN VIOLATION OF THOSE RIGHTS DURING STOP, SEARCH AND SEIZURE.

"THE CLAIM AND EXERCISE OF A CONSTITUTIONAL RIGHT CANNOT BE CONVERTED INTO A CRIME". (MILLER V. U.S. 230 F 486 AT 489).

II.

THE COURT SHOULD REVIEW, BECAUSE THE PETITIONER SEEKS REDRESS OF GRIEVANCE FOR VIOLATIONS OF HIS CONSTITUTIONALLY SECURED RIGHTS BY THE ARBITRARY RULINGS OF THE LOWER COURTS.

THE FACTS AND EVIDENCE IN THIS BRIEF PLAINLY SHOW THAT THE LOWER COURTS DID ERR WHEN RULING THAT THERE WERE NO VIOLATIONS OF THE PETITIONER'S RIGHTS PURSUANT TO THE MIRANDA DOCTRINE.

III.

THE COURTS SHOULD REVIEW, BECAUSE THE PETITIONER SEEKS REDRESS OF GRIEVANCE FOR THE DENIAL OF HIS RIGHT TO ASSISTANCE OF COUNSEL OF CHOICE BY THE LOWER COURTS, A RIGHT THAT THE PETITIONER HAD DEMANDED FROM THE ONSET.

THE EVIDENCE AND THE FACTS IN THE RECORD

SUBSTANTIATE THAT THE COURT, THE PROSECUTOR AND THE COURT APPOINTED COUNSEL WITH JUDICIAL KNOWLEDGE IGNORED THE PETITIONER'S DEMANDS FOR ASSISTANCE OF COUNSEL OF CHOICE IN THIS CRIMINAL ACTION FROM THE BEGINNING, AND THAT THOSE RIGHTS WERE DENIED BY ALL THE LOWER COURTS. "The privilege against self-incrimination is neither accorded to the passive resistant, nor the person who is ignorant of his rights, nor to one indifferent thereto. It is a fighting clause. Its benefits can be retained only by sustained combat. It cannot be claimed by attorney or solicitor. It is valid only when insisted upon by a belligerent claimant in person" (JOHNSON V. U.S. FED. 76 SUPP 538 pg. 540).

IV.

THIS COURT SHOULD REVIEW BECAUSE THE PETITIONER SEEKS REDRESS OF GRIEVANCE FOR ARBITRARY AND BRAZEN DENIALS OF DUE PROCESS BY THE LOWER COURTS.

PETITIONER HAS DEMANDED ALL OF HIS RIGHTS AT ALL TIMES. THE RECORD PLAINLY SHOWS THE JUSTICE COURT USED ITS DISCRETIONARY POWER TO BRAZENLY DENY AND SIDESTEP THE PETITIONER'S RIGHTS AND COURT RULES, CLEAR VIOLATIONS OF DUE PROCESS, EQUAL ACCESS/EQUAL PROTECTION UNDER THE LAW.

IN CONCLUSION

THE COURT SHOULD REVIEW BECAUSE THIS BRIEF ESTABLISHES THE GROSS VIOLATION OF CONSTITUTIONALLY PROTECTED RIGHTS.

SEARCH AND SEIZURE --- PURSUANT TO THE EXCLUSIONARY RULE -- THE STOP, SEARCH AND SEIZURE WAS ILLEGAL. THE EVIDENCE CLEARLY SHOWS THERE WAS NO PROBABLE CAUSE AT THE INITIAL STOP. THE TESTIMONY SHOWS THE ROAD IS NARROW, HILLY, DIPPY, AND MOUNTAINOUS, APPRECIABLY NARROWER THAN A NORMAL PIMA COUNTY ROAD, AND THAT SOME TYPE OF MOVEMENT WOULD BE EXPECTED WITHIN ONE'S LANE ON THIS TYPE OF ROAD. IF THE STOP AND ARREST HAD BEEN DONE IN THE NAME OF "WE THE PEOPLE" PURSUANT TO STATUTE, THE RANGER WOULD NOT HAVE IGNORED BASIC PROCEDURES FOR A D.U.I. INVESTIGATION, AS SHOWS IN THE RECORD. THERE WOULD'VE BEEN NO VIOLATIONS OF CONSTITUTIONAL RIGHTS. COUNSEL

WOULD'VE BEEN PROVIDED PURSUANT TO THE STATE'S OWN COURT RULINGS (KUNZLER VS. PIMA COUNTY) FROM THE ONSET, AS DEMANDED, AND THE ACCUSED WOULD'VE BEEN TAKEN BEFORE A MAGISTRATE, AS DEMANDED, AND AS THE LAW REQUIRES. HOWEVER, THE ACTIONS TAKEN WERE NOT STATUTORY, (e.g. "KEEP QUIET, SIGN HERE, NO RIGHTS, DO AS I SAY"), OUTSIDE OF THEIR RANGER'S POLICY MANUAL, IN VIOLATION OF INDIVIDUAL RIGHTS. THE PETITIONER CONFRONTED THE OFFICER'S SENSE OF AUTHORITY BY DEMANDING HIS RIGHTS... OFFICER MADDEN DID NOT ACT, HE REACTED BY STACKING CHARGES, CONVERTING RIGHTS INTO CRIMES, ACCUSING THE PETITIONER OF DISORDERLY CONDUCT, RESISTING ARREST AND D.U.I., ALL WHICH WERE LATER DISMISSED BY THE LOWER COURTS, EXCEPT THE D.U.I. MADDEN WAS NOT ACTING IN HIS OFFICIAL CAPACITY TO PROTECT THE PARK, BUT INSTEAD ACTED INDISCRIMINATELY WHEN HE MADE THE STOP WITHOUT PROBABLE CAUSE ON A PUBLIC

HIGHWAY. HE WAS NOT ACTING ON BEHALF OF THE HEALTH, SAFETY OR WELFARE OF "WE THE PEOPLE." AS THE RECORD SHOWS, WE WERE NOT IN THE PARK, THERE WAS NO TRAFFIC IN THE AREA OR PRIVATE CITIZENS INVOLVED, NOR A BREACH OF THE PEACE.

EXCLUSIONARY RULE - MIRANDA DOCTRINE

THE RECORD PLAINLY SHOWS THE PETITIONER DEMANDED RIGHTS UNDER MIRANDA. MIRANDA IS THE CASE LAW THAT BACKS THE EXCLUSIONARY RULE, AND VIOLATIONS OF THE EXCLUSIONARY RULE ARE VIOLATIONS OF THE PETITIONER'S CONSTITUTIONALLY PROTECTED 4TH, 5TH AND 6TH AMENDMENT RIGHTS.

IN EARLY NOVEMBER 1992, THE U.S. SUPREME COURT OF APPEALS UPHELD A 1986 DECISION IN THE COOPER CASE REGARDING MIRANDA/RIGHTS. IN THAT TUCSON, ARIZONA CASE, THE APPEALS COURT CALLED IT "AN EXAMPLE OF OFFICIALS WHO DELIBERATELY CHOOSE TO IGNORE THE LAW AND THE CONSTITUTION IN FAVOR OF THEIR OWN METHODS."

"FOR VICTIMS CAUGHT IN THEIR SNARE," THE APPEALS COURT SAID, "UNLESS ENFORCED, THE CONSTITUTION OF THE U.S. BECOMES A USELESS PIECE OF PAPER." PIMA COUNTY (ARIZONA) SHERIFF CLARENCE DUPNIK ON NOVEMBER 2, 1992 WAS QUOTED IN THE TUCSON CITIZEN NEWSPAPER AS SAYING THAT "FOR THE SAKE OF PUBLIC SAFETY, ON RARE OCCASIONS DEPUTIES HAVE IGNORED SUSPECT'S REQUESTS FOR A LAWYER AND THEIR RIGHT TO REMAIN SILENT." THE APPELLATE COURT RULED THAT THE INFORMATION GATHERED DURING QUESTIONING COULD BE USED AT THE TRAIL, AND WAS INTENDED FOR THAT PURPOSE.

WITH THIS APPELLANT'S REQUESTS TO SEE A LAWYER HAVING BEEN DISREGARDED, IT SHOWS THAT A PRISONER IS THEN IN A TOTALITARIAN NIGHTMARE WHERE THE POLICE DISREGARD THE CONSTITUTION, AND INSTEAD FOLLOW THEIR OWN SPUR-OF-THE-MOMENT JUDGMENT, INDISCRIMINATELY TREATING SUSPECTS ACCORDING TO THEIR OWN WHIMS. UP

UNITL THE COOPER CASE, THE ISSUE OF THE MIRANDA DOCTRINE WAS NEVER RAISED IN TUCSON (SAYS SHERIFF DUPNICK), BUT THAT'S NOT TRUE. THIS PETITIONER KNOWS MIRANDA IS NEVER RAISED BECAUSE OF THE LONG LEGAL, UPHILL BATTLE AND DENIALS FROM OUR COURTS TO HEAR AND RULE ON THOSE ISSUES, (TWO YEARS IN MY CASE), AND MOST INDIVIDUALS DON'T KNOW HOW TO MOVE FORWARD TO PROTECT AND (DEMAND) THEIR RIGHTS. CONSEQUENTLY, THE QUESTIONS (LIKE MIRANDA RIGHTS) ALMOST NEVER ARISE.

IN THIS CASE THE COURTS HAD JUDICIAL KNOWLEDGE OF THE APPELLANT'S RIGHTS AND CHOSE, AGAIN, TO VIOLATE THEM WITH DELIBERATE INDIFFERENCE. THIS IS JUST ANOTHER EXAMPLE OF THE ARBITRARY AND ABUSIVE USE OF POLICE POWER AND JUDICIAL INDISCRETION, EXEMPLIFYING A CAPRICIOUS ARROGANCE OF THOSE IN POWER.

IN MIRANDA AND ESCOBEDO, EVEN IF A MAN IS GUILTY, HE HAS RIGHTS. THEREFORE, ALL PEOPLE

HAVE THOSE SAME RIGHTS. WHAT GOOD ARE WORDS ON PAPER IF NO ONE ABIDES BY THEM? THOSE IN POWER MUST ABIDE BY THE RULES; TIME AFTER TIME THOSE IN POWER VIOLATE PROCEDURAL RULES. POWER CORRUPTS AND ABSOLUTE POWER CORRUPTS ABSOLUTELY. IT IS THEREFORE UP TO THE SUPREME COURT OF THE UNITED STATES TO ENSURE THAT **EVERY CITIZEN'S RIGHTS** ARE UPHELD TO THE LETTER OF THE LAW, TO INCLUDE BUT NOT BE LIMITED TO THE FOURTH, FIFTH AND SIX AMENDMENTS OF THE U. S. CONSTITUTION.

COUNSEL -- THERE WAS A BLATANT DENIAL OF COUNSEL AT THE STOP, SEARCH AND SEIZURE, AND DENIAL OF COUNSEL OF CHOICE AT ALL STAGES OF THE PROCEEDINGS, AS THE STATEMENTS MADE IN THE RECORD PLAINLY SHOW. THE COURTS ADMIT "WE DO THIS EVERY DAY." IN MY CASE THEY APPOINTED COUNSEL WHO PROVED TO BE INADEQUATE; FROM THE START THEY DENIED MY RIGHTS (i.e. WITNESSES AND TESTIMONY IN MY

BEHALF), DENIED MOTION HEARINGS AND DENIED MY RIGHT TO KNOW AND UNDERSTAND HOW AND WHY THEY WERE PROCEEDING FORWARD "BECAUSE THEY APPOINTED ME COUNSEL," EVEN IF IT WAS OVER MY OBJECTION. WHEN I, AS THE PETITIONER, OBJECTED TO COURT APPOINTED COUNSEL, THE COURTS JUST SAID "IF YOU DON'T LIKE IT, YOU CAN APPEAL IT," THEREBY CREATING A BUREAUCRATIC ADMINISTRATIVE BOONDOGGLE AGAINST ME. ONLY WHEN SOMEONE DEMANDS THEIR RIGHTS AND HAS ENOUGH KNOWLEDGE TO READ AND UNDERSTAND HOW TO APPEAL, CAN THE ARROGANCE OF THE LOWER COURTS BE BROUGHT TO LIGHT.

DUE PROCESS THE COURT CAN PLAINLY SEE FROM THE RECORD THE VIOLATIONS OF DUE PROCESS IN MY CASE.

THE POWER OF THE PROSECUTOR IS SO GREAT, THEY FEEL THEY CAN DO ANYTHING THEY WANT AT ANYTIME, AND THE COURTS BACK THEM. THEY BELIEVE THEY'RE ABOVE THE LAW, AND ARE A LAW

UNTO THEMSELVES. IF THE PROSECUTOR WAS PROPERLY PROSECUTING, IT WOULDN'T HAVE TAKEN EIGHT MONTHS TO DO WHAT THE COURT RULES SAY MUST BE DONE IN 40 DAYS. EVIDENCE IN THE RECORD PLAINLY SHOWS THAT PROSECUTORS JUST DO THINGS THE WAY THEY WANT, AND "IF YOU DON'T LIKE IT, YOU CAN APPEAL IT." WHEN I DEMANDED TO GO BEFORE A MAGISTRATE THE NIGHT OF THE ARREST, I WAS TOLD "WE DON'T DO IT THAT WAY ANYMORE."

RULES OF PROCEDURE WERE SIDE-STEPPED AND IGNORED IN THIS LONG, TWO-AND-ONE-HALF YEAR DESIRE TO PROSECUTE AND CONVICT WITHOUT ANY EVIDENCE. THE EVIDENCE IN THE RECORD SHOWS THAT THEY DID VIOLATE PETITIONER'S RIGHTS OF DUE PROCESS, AND THE ONLY WAY THEY WERE ABLE TO GAIN THE CONVICTION WAS TO DENY DUE PROCESS AND SIDESTEP ALL OF THEIR RULES OF PROCEDURE.

THERE WOULDN'T BE ANY REASON FOR A CLOSING

ARGUMENT OR APPEAL IF THE RIGHTS TO DUE PROCESS HADN'T BEEN VIOLATED OR DENIED. IT'S JUST A JOB TO THEM, NOT QUESTIONS OF RIGHTS, JURISDICTION OR DUE PROCESS. THE LAW EXISTS FOR US. IT'S THE JOB OF THE COURTS AND ITS OFFICERS TO UPHOLD THE LAW, NOT TO VIOLATE LAWS IN THEIR OWN BEHALF. EVERYTIME THEY VIOLATED THE PETITIONER'S RIGHTS, THE JUDGES WOULD SAY "IF YOU DON'T LIKE MY DECISION, YOU CAN APPEAL IT."

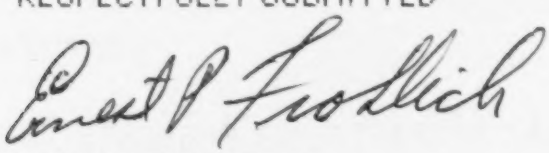
THIS APPELLANT RESPECTFULLY REQUESTS THE HONORABLE SUPREME COURT TO GRANT THIS WRIT OF CERTIORARI ON THE ERRS AND VIOLATIONS OF THE LOWER COURTS. THE COURT SHOULD REVIEW AND RULE ON THE VIOLATIONS OF MY CONSTITUTIONALLY PROTECTED RIGHTS WHICH CAUSED SUBSTANTIAL DAMAGE, AS ENUMERATED IN THIS BRIEF.

THIS PETITIONER LIVES HIS DAILY LIFE BASED UPON STARE DECISIS. IF THERE IS AN EXAMPLE WHEN

STARE DECISIS HAS ANY MEANING IT WOULD BE IN THIS CASE, AS REGARDLESS OF INNOCENCE OR GUILT, WE ALL THE HAVE RIGHTS TO DUE PROCESS.

WHEREFORE, APPELLANT PRAYS THIS COURT WILL REVIEW THIS WRIT OF CERTIORARI AND EXERCISE ITS DISCRETIONARY JURISDICTION OVER THIS MATTER.

RESPECTFULLY SUBMITTED



ERNEST P. FROHLICH
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EDITOR'S NOTE

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92-1291

CASE NO. _____

_____

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST P. FROHLICH,
PETITIONER,

VS.

THE STATE OF ARIZONA,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE PIMA COUNTY CONSOLIDATED JUSTICE
COURT FOR THE STATE OF ARIZONA

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ERNEST P. FROHLICH
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pro-per

61 pp

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EXHIBIT - A

PIMA COUNTY, ARIZONA

STATE) NO. CR90-006603

VS.)

ERNEST FROHLICH) CONDITIONS OF RELEASE

_____) VIDEO CONFIRMING ORDER

CHARGE(S): FAIL TO ID, DUI, DOC,

RESISTING ARREST

YOUR NEXT COURT DATE IS JUNE 28, 1990 AT 9:00 A.M. Justice Court (Tucson)

FOR: Pretrial Conference

RELEASE CONDITIONS:

RELEASED ON SIGNATURE PROMISING TO APPEAR

ORDER TO SHERIFF: Release the defendant.

XX Acknowledgement of appearance and conditions of release made before undersigned. DATE: 05/26/90

EXHIBIT - B

PIMA COUNTY JUSTICE COURTS

115 N CHURCH TUCSON, AZ 85701 740-804

STATE OF ARIZONA) Case No. CR90-006603

VS.) MITCH EISINBERG

ERNEST FROHLICH) COUNTY ATTORNEY

_____) Bruce

DEFENSE ATTORNEY

9:00AM

OFFENSE: DUI/DOC/RESISTING ARREST

DEFENDANT: PRESENT Date: 5/25/90

IT IS ORDERED: Motions due 20 days prior to trial. "Offer & Disclosure"

* Other: Set JT 9-11-90 9:00 A.M.

IT IS FURTHER ORDERED: 9-10-90 PO 8:45

Final P.T.C.- 8-23-90 @ 9:00

Counsel appointed over Def. objection.

DATED: 7/12/90 JUSTICE OF THE PEACE

(Ref: Pg. 29 and Pg. 35)

EXHIBIT - C

IN THE JUSTICE COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA	)	NO.90-006603
PLAINTIFF	)	Motions to
VS.	)	Suppress/
ERNEST FROHLICH	)	Dismiss
DEFENDANT	)	August 20, 1990
_____	)	

a. DEFENDANT'S IN CUSTODY STATEMENTS SHOULD BE SUPPRESSED

Dependant did not receive a re-citation of his Miranda Rights. His post-arrest statements should therefore be suppressed. Miranda v Arizona, 384 U.S. 436, (1966)

b. DEFENDANT'S RIGHT TO PRE-INTOX COUNSEL WAS VIOLATED

Defendant requested to speak to Counsel before he took the breath-alcohol test.

The police officer refused to give his permission to do this. In all criminal DWI proceedings, defendant always has the right to contact a lawyer before the breath test, as long as there is no disruption of the investigation, Kunzler v Pima County, 154 Az 568, 744 P.2nd 669(1987). The remedy should be dismissal, State v Holland, 147 Ariz. 453(1985), McNutt v Superior Ct, 133 Ariz 7, (1982).

c. THE INITIAL APPROACH AND INVESTIGATORY DETENTION WERE NOT CONSTITUTIONALLY JUSTIFIED.

Investigation pursuant to warrantless detentions which are not arrests require specific justification. Terry v. Ohio, 392 U.S. 19, 20, (1967), indicated that "Reasonableness in all circumstances of

the particular Governmental invasion of the citizens personal security..." is necessary. The Court in In re Troy C. 21 Cal. 3rd 888, 893(1978), stated that there must be specific articulable facts causing him (the police officer) to suspect that some activity relating to the crime has taken place or will take place. Here the initial investigation was unjustified according to the articulable facts test.

d. NO PROBABLE CAUSE FOR THE ARREST

Here the evidence did not rise to the level required by the standard used to determine Probable Cause: "a statement of facts which would cause a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."

People v Parker 85 Cal. App. 3d. 434(1978).

RESPECTFULLY SUBMITTED

DAVID BRUCE (ATTORNEY FOR DEFENDANT)

EXHIBIT - D

IN THE JUSTICE COURT OF THE STATE OF ARIZONA FOR PIMA COUNTY

(PIMA COUNTY JUSTICE COURT

90 AUG 22 PM 3:59)

THE STATE OF ARIZONA) CASE NO.90-006603

VS.) NOTICE AND DEMAND

Ernest P. Frohlich) RIGHT TO COUNSEL

_____)

Comes now the Accused, appearing specially and not generally herein, to demand as a matter of right under the Arizona Constitution and the United States Constitution the right to counsel.

This Free and Natural Person demands all his rights at all times never waiving any of them at any time including his right to time. In addition, if the court fails to timely notify this person of "Rights" Sua Sponte or those declared or demanded by this person, the court on its own volition denies itself jurisdiction.

This Free and Natural Person demands his right to counsel of choice and not to be forced to court appointed counsel over his objections.

Ref: 6th Amendment U.S. Constitution.

Oral argument demanded.

Respectfully submitted,

Ernest P. Frohlich, in Propria Persona

EXHIBIT - E

PIMA COUNTY JUSTICE COURTS

115 N CHURCH TUCSON, AZ 85701 740-8044

STATE OF ARIZONA CASE NO. CR90-006603

VS. MS DAY

ERNEST FROHLICH COUNTY ATTORNEY

IT IS ORDERED: Df motions filed 9-1-90 were denied.

Court denies - Set trial to go!

IT IS FURTHER ORDERED: as Of & Defense shall present to ct. respective rules before trial.

DATED: 9-10-1990 JUSTICE OF THE PEACE

EXHIBIT - F

PIMA COUNTY JUSTICE COURTS

115 N CHURCH TUCSON, AZ 85701 740-8044

STATE OF ARIZONA CASE NO. CR90-006603

VS. W. DAY

COUNTY ATTORNEY

ERNEST FROHLICH D. Bruce

DEFENSE ATTORNEY

OFFENSE: DEFENDANT: PRESENT

IT IS ORDERED:

___ **Defendant is ____ guilty** 28-692 (A)

Per Jury,; 28-721, 28-1075, + 28-729 all

Per Court.

Sentencing before Donfeld 10-3-90 9:00 pm

Dismiss w/prej. Per Judge Girard 13-2508,

13-2909 + 28-1253 had insurance.

DATED: 9-11-90 JUSTICE OF THE PEACE

EXHIBIT - G

PIMA COUNTY JUSTICE COURTS

115 N CHURCH TUCSON, AZ 85701 740-8044

STATE OF ARIZONA CASE NO. CR90-006603

VS. WANDA DAY

COUNTY ATTORNEY

ERNEST FROHLICH DAVID BRUCE

DEFENSE ATTORNEY

OFFENSE: DUI DEFENDANT: PRESENT 5-25-90

IT IS ORDERED: Bond appeal $500 Posted by 10-13-90

Motion for Post-Conviction relief denied.

Motion for Judicial notice of Adjudicative Facts denied.

X Defendant pay a fine of $ 472.50, + 8 = 480.50 + $300 ATTY FEES

X Defendant pay $ 50.- per month commencing the 1 day of Dec.,1990 until fine of 780.50 is paid.

Defendant to be committed to Pima county Jail for a period of 48 hours.

Defendant be placed on probation 12 mos: X supervised: ___ unsupervised.

DATED: 10-3-90 JUSTICE OF THE PEACE

EXHIBIT - H

a PIMA COUNTY CONSOLIDATED JUSTICE COURTS

115 N Church Avenue Tucson, Az 792-8044

STATE OF ARIZONA) CASE NO.90-006603

VS.)

ERNEST FROHLICH) CONDITIONS OF

_____) PROBATION

You have been place on (x) supervised probation for a period of 12 months. If you have been placed on supervised probation, you have 72 hours from date of sentence to report to:

PIMA COUNTY ADULT PROBATION

110 W. CONGRESS

8TH FLOOR

TUCSON, AZ 85601

You will violate no laws: city, county, state or federal. You will make reports to and carry out the lawful orders of your Probation Officer.

ADDITIONAL CONDITIONS: You have 72 hours from date of sentence to report to:

(X) With Alcohol Evaluation and Treatment

(X) Pay fine. Pay Atty. fees 48 Hrs. Jail

I understand that violation of the conditions above could result in the revocation of my probation and my being resentenced to the maximum term permitted for the offense for which I was convicted.

Date: 3 Oct 90

(signed) Ernest Frohlich under threat

DEFENDANT

12202 N. Puma Rd. Marana Arizona

DATED: 10-3-90 JUSTICE OF THE PEACE

b. PIMA COUNTY JUSTICE COURTS

115 N CHURCH TUCSON, AZ 85701 792-8044

STATE OF ARIZONA) CASE NO. 90-006603

VS.)

ERNEST FROHLICH) ORDER OF COMMITMENT

_____)

CHARGE(S): DWI

To the Sheriff of this County:

IT IS ORDERED: that Defendant be confined in the County Jail for a period of 48 hours or until further order of the Court. These days are being imposed as a term and condition of probation:

IT IS FURTHER ORDERED that Defendant report to the County Jail DATE: 10-26-90 TIME: 9:00 am. LOCATION: 29th + Mission Release 10-28-90 9am. to serve his sentence.

DATED: 10-3-90 Judge

c. I understand the terms of the above sentence and gree (agree) to appear at the time(s) indicated in a sober condition. I also understand that I must provide my own transportation.

DATED: Refused to Sign but given a copy

Defendant

EXHIBIT - I

PIMA COUNTY JUSTICE COURTS

115 North Church Tucson, ARIZONA 85701

792-8047

(PIMA COUNTY JUSTICE COURT

90-OCT-3 AM 10 05)

STATE OF ARIZONA) CASE NO. 90-006603

VS.)

) NOTICE OF APPEAL FROM

ERNEST FROHLICH) JUDGMENT OF NON-RECORD

_____) COURT (Traffic)

NOTICE IS HEREBY GIVEN that the defendant appeals the judgment and sentence entered in this Court on 3 Oct, 1990, at which time he was found guilty of: DUI

And was sentenced as follows:

$780.50 Fine

48 Hr. in Jail

12 Mo. Probation

DATED: 3 OCT 90 ERNEST FROHLICH

Defendant

EXHIBIT - J

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,)

Plaintiff,)

vs.) NO. CR-32362

ERNEST FROHLICH,)

Defendant.)

_____)

Tucson, Arizona

November 29, 1990

BEFORE: The Hon. Nanette M. Warner, Judge

Division 20

RE: Transcript of Proceedings Pretrial Conference

APPEARANCES:

Wanda Day, Esq.

Deputy County Attorney

For the Plaintiff

Mr. Ernest Frohlich In Propria Persona

(Pg. 3, lines 19 - 25)

THE COURT: I am going to deny your request for a trial de novo. It appears that the evidentiary matters were reported. That's all that had been reported. It will be decided on the transcripts and briefs that have been submitted. Has the briefing schedule

been set up?

MS. DAY: No. I thought we would do that today.

(Pg. 4, Lines 2 - 17)

THE COURT: I will give you, because of the holidays coming up and the transcripts have been prepared --

MS. DAY: Have you received copies of them yet?

I know Mr. Frohlich requested a preparation.

MR. FROHLICH: I have received nothing, Your Honor.

Ms. DAY: Have you requested to see whether they have been prepared or not?

MR. FROHLICH: I submitted my paperwork, and the only thing I ever received was a notice to appear today, which was in violation of the time frame for even having this heard, Your Honor.

It is in violation of Rule 30.3 and 30.4 for date and time of having this case heard.

(Pg. 5, lines 3 - 18)

MS DAY: The problem is the problem getting transcripts out of Justice Court. Sometimes they are very slow. So a lot of times the briefing schedule has to wait until the transcripts have been filed here.

THE COURT: There is a motion that was Order to prepare -- there was a motion filed by Mr. Bruce. He was your attorney below?

MR. FROHLICH: He was assistance to me only, Your Honor. He was not my attorney.

THE COURT: Okay. Well, he is licensed to practice law in the State and

he filed that motion?

MR. FROHLICH: Yes, ma'am.

MS. DAY: What we've done in these cases before is, once the transcripts are prepared, we use that date and then set the briefing schedule based on that date.

EXHIBIT - K

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OR PIMA

THE PEOPLE OF THE STATE OF ARIZONA,

PLAINTIFF AND RESPONDENT

vs.

ERNEST FROHLICH DEC 16 1991

DEFENDANT AND APPELLANT

NO. CR-32362

APPEAL BRIEF

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE JUDGEMENT OF THE PIMA COUNTY CONSOLIDATED JUSTICE COURT THE

HONORABLE ROBERT DONFELD, JUDGE

ERNEST FROHLICH

12202 N. PUMA RD

MARANA, ARIZONA 95653

1-602-682-5006

PRO-SA

EXHIBIT - L

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: HON. JOHN F. KELLY

Court Reporter: None CASE NO. CR-32362

DATE: February 6, 1992

STATE OF ARIZONA

VS

ERNEST FROHLICH

MINUTE ENTRY

IN CHAMBERS RULING RE: JUSTICE COURT APPEAL:

The Court has read appellant's brief

and Appellee's response and has read the transcripts including the transcript of the suppression hearing held on September 4, 1990.

THE COURT FINDS that there is substantial evidence in the record to support the jury's verdict and to support the decision of the Justice of the Peace with regard to the motions to suppress.

THE COURT FURTHER FINDS that the decision of the Justice of the Peace was not illegal or an abuse of discretion, there fore,

IT IS ORDERED that the judgment of the Justice Court is affirmed.

IT IS FURTHER ORDERED that Appellant's opposition to State's motion to strike petitioner's motions dated February 3, 1992 is denied.

IT IS FURTHER ORDERED that

Appellant's demand for oral argument is denied.

IT IS FURTHER ORDERED that Appellant's motion for default judgment is denied.

IT IS FURTHER ORDERED this matter be remanded to Justice Court for all further proceedings.

Sherrill V. Yarema - Deputy Clerk

EXHIBIT - M

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: HON. JOHN F. KELLY

Court Reporter: None CASE No. CR-32362

DATE: February 28, 1992

STATE OF ARIZONA

VS

ERNEST FROHLICH

MINUTE ENTRY

IN CHAMBERS RULING RE: DEFENDANT'S MOTION FOR RECONSIDERATION AND DEMAND FOR ORAL ARGUMENT:

IT IS ORDERED the motion for reconsideration is denied.

IT IS FURTHER ORDERED the demand for oral argument is denied.

Sherrill V. Yarema - Deputy Clerk

EXHIBIT - N

IN THE COURT OF APPEALS STATE OF ARIZONA

DIVISION TWO

FILED BY CLERK

MAY - 4 1992

COURT OF APPEALS DIVISION TWO

Order 2 CA-CR 92-235-PR

THE STATE OF ARIZONA,) PIMA County

Respondent,) Superior Court

vs. Cause No. CR-32362

ERNEST FROHLICH,)

Petitioner,)

_____)

ORDERED: Notice and Demand for the Complete Record to be Reviewed for this Appeal (Oral Argument Demanded) is denied.

FURTHER ORDERED: The above-entitled cause number is amended to read 2 CA-CR 92-0235, the caption is amended accordingly.

It appearing to the court that this appeal is without the jurisdiction of this Court, pursuant to Arizona Constitution Article 6, Sec, 5(3); A.R.S. Sec. 22-375, therefore,

FURTHER ORDERED: The above-entitled appeal is DISMISSED.

Judges Hathaway and Drake concurring.

Dated: May 4, 1992 Lloyd Hernandez

Presiding Judge

EXHIBIT - O

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING 1501 WEST WASHINGTON PHOENIX, ARIZONA 85007-3329 TELEPHONE:(602)542-9396

August 11, 1992

RE: STATE OF ARIZONA vs. ERNEST FROHLICH

Supreme Court No. CR-92-0213-PR

Court of Appeals No. 2 CA-CR-0235

Pima County No. CR-32362

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 10, 1992, in regard to the above-referenced cause:

On consideration, Chief Justice Feldman,

Vice Chief Justice Moeller and Justice Martone participating,

ORDERED: Petition For Review = DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 11th day of August, 1992.

NOEL K. DESSAINT, Clerk

EXHIBIT - P

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING 1501 WEST WASHINGTON PHOENIX, ARIZONA 85007-3329 TELEPHONE:(602)542-9396

September 10, 1992

Mr. Ernest P. Frohlich

12202 North Puma Road

Marana, Az 85653

RE: STATE OF ARIZONA vs. ERNEST FROHLICH

Supreme Court No. CR-92-0213-PR

Court of Appeals No. 2 CA-CR 92-0235

Pima County No. CR. CR-32362

Dear Mr. Frohlich:

On August 26, 1992, our office received from you an "Opposition/ Objection to Ruling" in the above-referenced case. As you know, this court denied review in the above-referenced case which was communicated to you by minute letter on August 11, 1992. Rule 31.18 of the Arizona Rules of Criminal Procedure states, in part, that "unless permitted by specific order of the appellate court, no party shall file a motion for reconsideration of an order denying a petition for review."

Consequently, your document shall not be filed in this case, nor processed.

Very truly yours, Clerk of the Court

EXHIBIT - Q

IN THE PIMA COUNT CONSOLIDATED

JUSTICE COURTS

THE STATE OF ARIZONA,)

Plaintiff,)

VS) CR90-006603

ERNEST FROHLICH)

Defendant,)

_____)

TRANSCRIPTION OF MARTIAL HEARING

SEPTEMBER 04, 1990

PRESIDING: EMOJEAN GIRARD

APPEARANCES: WANDA DAY, STATE OF ARIZONA

DAVID BRUCE/ERNEST FROHLICH

ATTORNEY AT LAW FOR THE DEFENDANT

M.T. (Pg. 04, lines 5 -7)

MR. BRUCE: I was appointed...my statement to the judge was that Mr.

Frohlich objected to the appointment of any counsel and the judge indicated that you can utilize Mr. Bruce however you wish.

M.T. (Pg. 05, lines 4 -6)

MS. DAY: Okay. And...and I would just like to have the court make mote that he did object to having a counsel appointed for him.

H. T. (Pg. 11 lines 13 -15)

Q: And did you actually see...see the dirt coming out?

A: Uh, not that I recall. What I mean referring to dirt is it's not a paved shoulder. It is of grass and desert brush.

Hearing Trial (Pg. 19, lines 10 - 14)

MS. Day: Okay. Uh, did you, uh, read the, uh, defendant his Miranda rights?

OFFICER MADDEN: At this time, no, not until...oh, after he had ben secured, yes, he was read his Miranda warrants after we had stood him up by the vehicle.

(Pg. 19, lines 19 -21)

Q: (Pause) And did you ask him if he would waive his Miranda rights?

A: I did ask that question and no he did not.

(Pg. 21, lines 17 -18)

Q: Did he mention anything about any attorney?

A: Uh, not that I recall.

(Pg. 22, lines 4 -6)

A: Um, he indicated to me verbally

or he refused to take the test, uh, stating that we would be illegally taking, uh, evidence without an attorney.

H. T. (Pg. 28, lines 14 -24)

Q: Now, isn't it true that the particular, uh, roadway upon which my client was driving one that was, you might character... would characterize as a winding roadway would you not?

A: The road has curves in it, yes.

Q: And, uh, wouldn't you describe those curves as being, uh, uh, significant in their curbiture?

A: I think that's all relevant as to what's significant in curves and what's not.

Q: Would you say they're not significant.

A: I would say they would be

significant at eighty miles an hour Whether they're significant at thirty-five I would say 'no'.

(Pg. 30, line 21)

A: I don't recall any direct request for counsel.

(Pg. 33, lines 8 -11)

MR. BRUCE: Yeah, isn't it true that in the written report there is no indication that you noted that you gave him his Miranda rights. Isn't that correct?

OFFICER MADDEN: I don't see it in the report.

(Pg. 34, lines 17 -19)

Q: And that happened only two times.

Is that correct in a period of a mile and a half.

A: Yes sir.

M.T. (Pg. 64, lines 7 -13)

JUDGE GIRARD: Um, I'm ready to rule on that issue I think.

MR. BRUCE: Okay.

JUDGE GIRARD: Um, the defendant was raising the issue, but he really didn't ask for an attorney, um, unfortunately, sometimes it's the manner in which we do things that either does or doesn't bring about the desired result, uh, I'm denying the motion. Uh, I think the defendant did't request an attorney. Had he requested one the officer's procedure should have been different, but I don't find that you..you did in all of that.

EXHIBIT - R

IN THE PIMA COUNT CONSOLIDATED

JUSTICE COURTS

THE STATE OF ARIZONA,)

Plaintiff,)

VS) CR90-006603

ERNEST FROHLICH)

Defendant,)

_____)

TRANSCRIPTION OF JURY TRIAL

SEPTEMBER 11, 1990

PRESIDING: ROBERT DONFELD

APPEARANCES: WANDA DAY, STATE OF ARIZONA

DAVID BRUCE/ERNEST FROHLICH

ATTORNEY AT LAW FOR THE DEFENDANT

T.T. (Pg. 50, lines 1 - 6)

A: As I recall it was a, uh, clear evening. There were no, uh, problems, no

clouds and, uh, no wind. It was, uh, a calm night.

Q: How about the traffic conditions?

A: Uh, we were the only vehicles on the road, uh, at that time and throughout the, uh, trip I do not recall any vehicles other than ours.

T.T. (Pg. 67, lines 23 - 25)

Q: Okay. (Sigh) You s...I know that the road is windy, uh, how many curves or turns would you say you went through during this mile and a half of drive down this road?

T.T. (Pg. 68 lines 19 - 25)

Q: Uh, you stated that the accused, uh, crossed the center line, uh, wherever it was, uh, could you tell us how far that...that was, I mean, did the wheels

just barely get over the line or was it three feet over the line?

A: The wheels were over the yellow line.

Q: Just the wheels?

A: Yes sir.

(Pg. 68, lines 1 - 10)

mile and a half, would you say you went through twenty turns?

A: No, I wouldn't think so.

Q: Would you say it was fifteen turns.

A: I would say it's depending on what your view of turns are. I would say only three.

Q: Well, great...greater than a forty-five degree angle of a turn.

A: No. I would say probably no more

than three or four.

Q: Is there any hills or dips in this road?

A: Yes there are.

T.T. (Pg. 69, lines 1 - 3)

Q: Was it dark enough no this particular night to observe, uh, oncoming traffic by just the headlights of their car on the road?

A: Yes sir.

T.T. (Pg. 75, lines 15 - 24)

Q: Could...could the accused have said, I want probable cause, fourth amendment warrant, and council?

A: I recall about fourth amendment, yes. I don't recall the rest.

Q: Could he have said that statement?

A: He could have.

Q: Did he ask to be taken to a magistrate that night?

A: I don't recall.

Q: Did he ask for your badge... your name and badge number?

A: That I don't recall.

T.T. (Pg. 77, lines 22 - 24)

Q: (Pause) You said you read the complied consent form and the accused...did the accused at that time say, "I need counsel,"?

A: Not that I recall.

T.T. (Pg. 78, lines 21 -25)

Q: My specific question is: Do you have anything in writing that says the accused waived counsel?

A: No.

Q: Uh, was there a reason not to allow the accused to call counsel that night?

T.T. (Pg. 79, line 1)

A: He never asked.

T.T. (Pg. 79, lines 18 - 25)

Q: I understand and we haven't gone into any of the other stuff. Uh, you say that the accused refused to sign the paperwork and then was rehandcuffed and taken for incarceration that particular night?

A: That's right.

T.T. (Pg. 79, lines 22 - 25)

Q: Okay. you say that the jail required his fingerprints that night, uh,

did you have to force the accused to get his fingerprints?

A: Myself and several correction's officers were required to

T.T. (Pg. 80, lines 1 - 3)

fingerprint you.

Q: Did he object to it?

A: The accused? Yes he did.

T.T. (Pg. 95, lines 9 - 20, 23)

MR. BRUCE: No, he's not going to testify. Your Honor, we would like...we would like to call Officer Rankin. We realize we indicated there wouldn't me witnesses. However, we did subpoena him ourselves.

JUDGE DONFELD: Is he here?

MS. DAY: No, he's not here.

MR. BRUCE: I believe he...

MR. FROHLICH: He was here this morning.

MS. DAY: He was here this morning, but, I released him because I decided that I had enough inf...evidence without him.

JUDGE DONFELD: Did you subpoena him?

MR. BRUCE: We subpoenaed him.

JUDGE: Do you have any evidence that you subpoenaed him?

T.T. (Pg. 96, lines 4 - 15)

MR. BRUCE: I can, uh, certainly we can call the constable over at the...the...the, uh...

JUDGE DONFELD: I...I don't see anything in my file that indicates there was a return of service.

MR. BRUCE: Ther...they...I never get

a return of service from them your Honor. I don't know whether you did or not, but they give me no copies, but, that could be easily determined if we simply call the constable's office.

MS. DAY: Your Honor, uh just to let the court know, I asked him if he had been supoenaed by the defendant and he said he was in deed subpoenaed for the Evidentiary Hearing, but not for the trial itself.

T.T. (Pg. 100, lines 17 -25)

JUDGE DONFELD: Be seated please. Mr. Bruce, did you make the phone call.

MR. Bruce: Yeah, I called the counsel and I...the Constable and I don't think I can back up my statement. The only...the only, uh, date they have,

they don't...they don't have the subpoena. All they have is a date they wrote 9-4. 9-4 happens to correspond with...with the motion date. That's the only date they have, uh, written and...

JUDGE DONFELD: So then, I can assume that the officer was not subpoenaed for todays trial?

T.T. (Pg. 105, lines 23 -25)

JUDGE DONFELD: Well, let...let me lay all of that to rest for your client. You know the law as well as I do. Mr. Frohlich, listen very carefully. The law does not require a wit...a written

---

T.T. (Pg. 106, lines 1 - 13)

waiver of Miranda rights. That's number one. Number two: You were not questioned by the officers in a custodial sense, at

least, nothing...no questions and answers that were elicited to the jury such as would give rise to Miranda. Miranda only applies in a custodial interrogation where the officer is now using the question and the answers before the jury. None of that was given. He never had an opportunity to ask you questions, nor did you elicit any answers. So, Miranda really doesn't apply in this case.

MR. FROHLICH: I'll have to object on that finding, your Honor. I believe Miranda does apply because it is not only questions and answers, it is evidence. And, in this case they're trying to use a breathilyzer as evidence. And, in this case they're trying to use a breathilyzer as evidence and there...therefore it does fall under Miranda.

JUDGE DONFELD: Alright. Your objection is noted for the record and denied.

EXHIBIT - S

RULES OF CRIMINAL PROCEDURE Pg. 164

RULES OF CRIMINAL PROCEDURE

a. **RULE 26.10 PRONOUNCEMENT OF JUDGMENT AND SENTENCE**

b. Pronouncement of Sentence. The Court shall: (2) State that it has considered the time the defendant has spent in custody on the present charge;

POST-VERDICT PROCEEDINGS Pg. 165

b. **RULE 26.11 DUTY OF THE COURT AFTER PRONOUNCING SENTENCE**

c. Hand the defendant a written notice of these rights and the procedures he must follow to exercise them, receipt of which shall be shown affirmatively in the record.

c. **APPELLATE RULES** Pg. 173

RULE 31.10 FILING OF THE RECORD

Upon receipt, the clerk of the Appellate Court shall file each portion of the record and shall immediately give notice to all parties of the date on which the record is complete.

RULES OF CRIMINAL PROCEDURE Pg. 170

d. **RULE 30.3 PREPARATION OF RECORD**

Within 3 days of receiving notification of the appeal, the presiding officer of the lower court shall transmit to the clerk of the Superior Court such records of the proceedings in his court as are required by statute. He shall immediately stay the execution of any element of the sentence requiring the incarceration of the defendant and shall

stay the execution of any other element of the sentence upon the execution of a bond in the manner provided by law.

e. **RULE 30.4 SETTING THE DATE FOR TRIAL**

Within 7 days after receipt of the record of the case, the appeal shall be entered on the docket, set for trial on a date within 40 days of the filing of the notice of appeal, and the parties notified of the trial date.

EXHIBIT - T

TRANSPORTATION Title 28

ARTICLE 2. GENERAL PENALTIES

Sec. 28-181. Violation; classification; exception; failure or refusal to do or perform required act

A. A person violating any provision of this title, or failing or refusing to do or perform any act or thing required by

this title, is guilty of a class 2 misdemeanor, unless the statute defining the offense provides for a different classification. This subsection does not apply to any provision or requirement of chapter 3, 4 or 6 or chapter 7, article 8 or chapter 8, article 3.2 of this title.

A. Any violation of or failure or refusal to do or perform any act or thing required by chapter 3, 4 or chapter 7, article 8 or chapter 8, article 3.2 of this title constitutes a civil traffic violation unless the statute defining the violation provides for a different classification. Civil traffic violations are subject to the provisions of chapter 6, articles 20 and 21 of this title.

EXHIBIT - U

TRANSPORTATION Title 28 Pgs. 560 & 561

Sec. 28-1053. When person arrested must be taken immediately before a magistrate

When a person is arrested for any violation of this chapter punishable as a misdemeanor, the arrested person shall be immediately taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense, provided a person taken before a justice of peace shall be taken before the nearest or most accessible with reference to the place where the arrest is made, in any of the following cases:

1. When a person arrested demands a immediate appearance before a magistrate.
2. When the person is arrested upon a charge of negligent homicide.
3. When the person is arrested upon a

charge of driving while under the influence of intoxicating liquor or narcotic drugs.

4. When the person is arrested upon a charge of failure to stop in the event of an accident causing death, personal injuries or damage to property.

5. When it reasonably appears to the arresting officer that the person arrested is about to leave the jurisdiction of the state.

6. In any other event when the person arrested refuses to give his written promise to appear in court as provided in this article.

Amended by Laws 1959, Ch. 101, sec. 1.

EXHIBIT - V

CRIMINAL CODE Title 13

Sec. 13-3884. Arrest by private person

A private person may make an arrest:

1. When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.

2. When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.

EXHIBIT - W

COUNTIES Title 11 Pg. 390

Sec. 11-938. Agreement to appear in court

County parks rangers are authorized to take any person before a magistrate within the county in which the offense is committed for a violation of any of the rules and regulations passed pursuant to this article, but any person apprehended

for violation any of the rules or regulations passed pursuant to this article punishable as a misdemeanor may be issued a notice to appear before such magistrate bearing the date, time and place for such appearance, the offense charged and the location or approximate location where the violation was committed. The notice to appear shall be signed by the person notified to appear, and he shall be given a copy thereof and thereupon released from custody. Failure of such person to appear at the time and place specified shall be cause for issuance of a warrant for his arrest.

EXHIBIT - X

PIMA COUNTY SHERIFF'S DEPARTMENT

P.O. BOX 910, TUCSON, ARIZONA 85702

Report No. 90-05-25-953 **Incident Location** Kinney Rd. 1/4 Miles of McCain Loop(N) **Class** 21.04 **Dist.** SX **Reporting Officer** K. W. Madden **Badge** 1411 **Date** 05/25/90 **Time** 2009

SYNOPSIS ONLY

On 05/25/90 at approximately 2005 hrs, I was N/B on Kinney Rd 1/2 south of Juan Santa Cruz picnic area in Tucson Mountain park. I observed a 19 VW rabbit (CTB-756 Az) in front of me go off the right side of the road and then abruptly correct. The vehicle continued N/B and continued weaving within its lane. The vehicle then drove left of center negotiating a turn by Juan Santa Cruz picnic entrance. The vehicle continued N/B and again crossed left of center just north of the Desert Museum entrance. I activated my

emergency lights, however. There was no apparent response by the driver, who again crossed left of center just north of the Desert Museum. I got on the P.A. and told the driver to stop his vehicle at which he slowly complied. I made contact with the driver, Ernest Peter Frohlich, and immediately noticed a strong odor of alcoholic beverage coming from his breath. I asked for his Reg. Ins. + D/L at which he slowly fumbled for Mr Frohlich appeared very lacksidasical in his search. Mr. Frohlich was asked 3 times for his D/L and did not produce it. I asked him to get out of the car and he refused. Mr Frohlich was very belligerent and stated I had no cause to stoop or detain him. I asked again for him to get out of the vehicle and he refused. Mr

Frohlich was physically removed by officers from the vehicle. Mr Frohlich held onto his steering wheel as we attempted to remove him. After breaking him free he struggled on the road in an attempt to prevent handcuffing. Mr Frohlich was finally secured and placed into a P.C.S.O. transport. And transported to Pima County Jail. Mr Frohlich refused Intoxilyzer saying it violated his rights. Mr Frohlich was cited for failure to produce D/L /Identity upon request (28-1075) D.U.I (28-692A) Disorderly Conduct (13-2904) Resisting arrest (13-2508). Mr Frohlich refused to sign any of the citations and was subsequently booked into the Pima County Jail. N.F.I. K.W. MADDEN 1411

INCIDENT REPORT - NARRATIVE

EXHIBIT - Y

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: HON. JOHN F. KELLY

DATE July 19, 1991 CASE NO. CR-32362

STATE OF ARIZONA

vs.

ERNEST FROHLICH

MINUTE ENTRY

IN CHAMBERS RULING RE: JUSTICE COURT APPEAL:

IT IS ORDERED that the State's motion to strike the defendant's motion to dismiss for lack of jurisdiction is granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss for lack of jurisdiction is stricken. Defendant may rise this issue in his brief.

IT IS FURTHER ORDERED that all Justice Court transcripts necessary to the decision in this matter be filed in Superior Court no later than 5:00 p.m. on August 16, 1991. Sherrill V. Yarema

Deputy Clerk

EXHIBIT - Z

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

PLAINTIFF,

Vs. CR-32362

ERNEST FROHLICH OBJECTION to JUDGES

ACCUSED. KELLY'S ORDERS

ORAL ARGUMENT DEMANDED

NOW COMES THE ACCUSED THROUGH HIMSELF AND OBJECTS TO THE HON. JUDGE KELLY'S ORDERS DATED 19, JULY 1991. THE FIRST ORDER VIOLATES THE ACCUSED'S CONSTITUTIONAL

RIGHTS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW. THIS IS JUST ANOTHER IN A SERIES OF ORDERS DENYING THIS ACCUSED OF HIS RIGHTS AND VIOLATES THIS ACCUSED'S NINTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES of AMERICA.

OBJECT TO THE SECOND ORDER AS IT AGAIN VIOLATES RULE 30.3. THIS IS THE THIRD TIME THIS COURT HAS OVER RULED THIS RULE AND THE COURT IS BOUND TO OBEY THESE RULES. OBJECTION

THE ACCUSED MOVES THIS COURT TO DISMISS ANY AND ALL OF THESE ACTIONS AGAINST HIM WITH PREJUDICE AS THE COURT AND ITS AGENTS ARE STILL VIOLATING RULE 30.3 (EVEN IN LIEU OF COURT ORDERS) TO RESPOND AND PROCEED IN A TIMELY MANNER.

RESPECTFULLY SUBMITTED,

THIS DATE 5 AUG. 91 ERNEST FROHLICH

Supreme Court, U.S.
FILED
NOV 24 1992
OFFICE OF THE CLERK

92-1291

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST P. FROHLICH,
PETITIONER,

vs.

THE STATE OF ARIZONA,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE PIMA COUNTY CONSOLIDATED JUSTICE
COURT FOR THE STATE OF ARIZONA

RESPONDENT'S BRIEF IN OPPOSITION

JOHN W.DICKINSON
Office of the Pima County Attorney
32 N. Stone, Ste. 1400
Tucson, Arizona 85701
602-740-5679
Counsel for Respondent

NO._____

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Tucson, Arizona 85701
602-740-5679
Counsel for Respondent

QUESTIONS PRESENTED

1. WHETHER THE SUPREME COURT MUST DENY THE PETITION FOR CERTIORARI WHEN SUPREME COURT PRECEDENT MANDATES THAT IT SHOULD REFUSE TO EXERCISE ITS DISCRETIONARY JURISDICTION?

PARTIES TO THE CASE

HON. ROBERT GIBSON, JUSTICE OF THE PEACE, PIMA CO. CONSOLIDATED JUSTICE COURTS

HON. EMOJEAN GIRARD, JUSTICE OF THE PEACE, PIMA CO. CONSOLIDATED JUSTICE COURTS

HON. ROBERT DONFELD, JUSTICE OF THE PEACE, PIMA CO. CONSOLIDATED JUSTICE COURTS

HON. JOHN F. KELLY, JUDGE OF THE SUPERIOR COURT IN AND FOR PIMA COUNTY, ARIZONA

ERNEST P. FROHLICH, PETITIONER AND DEFENDANT IN PIMA CO. JUSTICE COURT CAUSE NUMBER CR 90-006603 AND APPELLANT IN PIMA CO. SUPERIOR COURT CAUSE NO. CR-32362

THE PIMA COUNTY ATTORNEY'S OFFICE, FOR THE STATE OF ARIZONA IN THE ABOVE ACTIONS

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CITATIONS OF OPINIONS

The Respondent would adopt the Petitioner's Citations of Opinions with the following modifications:

1. There is no record of a refusal by Judge Gibson to make a record of the hearing. There is also no record that the court denied the Petitioner his counsel of choice, and no record that the court appointed inadequate counsel.

2. There is no record that the court appointed counsel was inadequate. There is also no record that the Petitioner informed the arresting officer that he needed counsel during arrest.

9. It should be added that in the letter to the Petitioner, Arizona Supreme Court Clerk Noel K. Dessaint instructed the Petitioner that his Motion for

Reconsideration must be filed, pursuant to Rule 31.18 of the Arizona Rules of Criminal Procedure, only by order of the Arizona Court of Appeals.

STATEMENT REGARDING JURISDICTION

The Petitioner cites the 4th, 5th, and 6th Amendments to the United States Constitution as authority for why this Court has jurisdiction to hear his case. He makes no further statement.

Any statutory authority allowing this Court to review the petition for certiorari arises from 28 U.S.C. § 1257.

This honorable Court should deny its discretionary jurisdiction for the following reasons: (1) the Petitioner seeks review of specific evidentiary findings, and Supreme Court precedent mandates that this Court does not accept review of factual disputes; (2) the Petitioner seeks review of concurrent factual findings of two lower courts, which this Court also does not review; (3)

the matters sought to be reviewed have been settled in previous United States Supreme Court case law; (4) the ineffective assistance of counsel and counsel of choice issues presented were not properly raised below, were not adequately reserved in the record, and cannot therefore be adequately reviewed by this Court; (5) the Petitioner has failed to forward special and important reasons that warrant a granting of certiorari; and (6) the Petitioner's application for certiorari inappropriately addresses issues in argument not addressed in the questions presented for review, and is also inaccurate and unclear.

The reasons for the request of denial are more fully set forth in the arguments section, infra.

TITLE 28, UNITED STATES CODE, § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by The Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

On May 25, 1990, at approximately 8:00 p.m., Pima County Park Ranger Kevin Madden was patrolling Tucson Mountain Park northbound on Kinney Road, in Pima County, Arizona. (Transcript of Jury Trial, Sept. 11, 1990, p. 39; hereinafter TJT). Ranger Madden saw the Petitioner, Ernest Frohlich, proceed north on Kinney Road. (TJT, p. 50). the Petitioner's automobile swerved off the right side of the road and abruptly corrected itself back onto the highway. (Id.) As Ranger Madden followed the Petitioner's vehicle, he witnessed it weaving back and forth in its own lane. (Id.). The car then crossed over the double yellow lines and entered the lane of oncoming traffic. (Id.). When the Petitioner's car swerved into the lane of

oncoming traffic again, Ranger Madden activated his overhead emergency lights and attempted to stop the vehicle. (Id.). The Petitioner did not stop, but instead crossed over the double yellow lines a third time. (Id., p. 51). Ranger Madden finally activated his public address system to order the Petitioner over to the side of the road. (Id., p. 52).

Ranger Madden approached the Petitioner and asked for his driver's license, automobile registration, and proof of insurance. (TJT, p. 52). The Petitioner refused to comply until he was told why he had been stopped. (Id., p. 53). While the Petitioner searched for his paperwork, Ranger Madden noticed the Petitioner's speech was slurred, his breath smelled strongly of alcohol, and

his eyes were watery and bloodshot. (Id., p. 54). When Ranger Madden asked the Petitioner to turn his ignition off, the Petitioner did not respond. (Id.). Concerned for his safety, Ranger Madden called for backup. (Id., p. 56).

Pima County Parks and Recreations Ranger Chester Manning arrived shortly thereafter. (TJT, p. 58). The Petitioner was handcuffed, arrested, and given his warnings as required by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). (Id., p. 60-61). The Petitioner walked to the patrol car with an unsteady, uncoordinated gait. (Id., p. 61). An inventory search of the Petitioner's car produced one full and one partially full can of beer. (Id., p. 63).

Later at Pretrial Services, the

Petitioner was read Arizona's Implied Consent law and asked to submit to an intoxilyzer test. (TJT, p. 64). The Petitioner refused to take a test. (Id., p. 66). The Petitioner was charged with driving under the influence of intoxicating liquor in violation of Arizona law, Title 28 Arizona Revised Statutes, § 692. (Id., p. 125).

On July 12, 1990, Judge Robert Gibson of the Pima County Consolidated Justice Courts appointed Mr. David Bruce to represent the Petitioner over the Petitioner's objection. (Justice Court Minute Entry, July 12, 1990). The Petitioner and his counsel filed several motions. (All are contained in the record from the Justice Court). He requested the Justice Court to dismiss for lack of

articulable facts to stop and for lack of probable cause to arrest. He filed a motion to suppress statements based on the allegation that Miranda rights were not read to him. He twice requested the court to suppress the intoxilyzer refusal, claiming he had requested counsel and that he had been denied counsel. The Petitioner also filed a motion to dismiss claiming this Supreme Court had ruled in "Brisco v. LaHue 460 US ____(1983), that police officers may commit perjury with impunity," and that therefore he could not receive a fair trial. A hearing on all of the Petitioner's motions was held September 4, 1990, before the Honorable Emojean Girard. (Transcription of Material Hearing, Sept. 4, 1990; hereinafter TMH). Mr. David Bruce assisted the Petitioner in

the course of this hearing. (Id.).

At the motions hearing only Ranger Kevin Madden testified. (TMH) There was no testimony adduced that the Defendant ever asked for an attorney. (Id.) The Petitioner made several complaints of violation of Constitutional rights, but Ranger Madden did not recall him mentioning anything about an attorney. (Id., p. 21). Up until the time that Ranger Madden took the Petitioner to the intoxilyzer (or blood-alcohol) machine, Ranger Madden did not recall the Petitioner asking for an attorney. (Id., p.20). When asked to take the intoxilyzer test, the Petitioner refused, stating that police would be illegally taking evidence without an attorney. (Id., p.22). In the entire contact, Ranger Madden could not

recall any direct request for counsel. (Id., p. 30).

After hearing the evidence and argument of counsel and the Petitioner, Judge Girard made the factual finding that the Petitioner did not ask for counsel during his contact with police. (TMH, p. 64). Judge Girard denied the motion to dismiss based on the alleged Miranda violation, and found that there was no interrogation after Miranda rights were given. (Id.). She reserved her final ruling. (Id., p. 65).

On the day of trial, September 11, 1990, the Petitioner insisted on representing himself, and the trial court (Judge Robert Donfeld) provided Mr. David Bruce to advise and assist the Petitioner during trial. (TJT, p.2). Judge Donfeld

indicated before the trial began that Judge Girard had communicated to him that she had denied all of the Petitioner's motions raised at the evidentiary hearing. (Id., p.7). Judge Girard had made specific factual findings that there was suspicion to stop and probable cause [to arrest]. (Id.). Judge Girard also found that the Petitioner did not request an attorney and that the motion regarding Miranda rights was denied. (Id.).

The Petitioner was tried before a jury on September 11, 1990, and was convicted of Driving Under the Influence of Alcohol. (TJT, p. 128). Counsel for the Respondent can find no record in the Justice Court that the Petitioner ever raised the issue of counsel of choice. There exists only the objection to the appointment of

counsel before Judge Gibson on July 12, 1990, and a brief discussion at the evidentiary hearing of September 4, 1990, between Judge Girard and Mr. Bruce, regarding the appointment and the Petitioner's objection. (TMH, p. 4). The counsel of choice issue was inappropriately addressed for the first time in the Petitioner's Opening Brief on Appeal to the Pima County Superior Court. (Petitioner's Appellant's Opening Brief, Pima County Superior Court). The Petitioner filed for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure, but the issues addressed in that petition were regarding Judge Girard's denial of the Miranda motion to suppress, and a ruling made by Judge Donfeld at trial. (Petition for

Post-Conviction Relief, September 19, 1990, Pima County Consolidated Justice Court). Judge Donfeld denied the petition at Sentencing. (Transcription of Sentencing, October 3, 1990, p. 3).

The Petitioner appealed the rulings of the various justices of the peace and the jury verdict to the Pima County Superior Court as allowed by Arizona Statute (Id.). Superior Court Judge John F. Kelly found "that there is substantial evidence in the record to support the jury's verdict and to support the decision of the Justice of the Peace with regard to the motions to suppress." (Pima County Superior Court Minute Entry, February 6, 1992). The Honorable John F. Kelly found further that "the decision of the Justice of the Peace was not illegal or an abuse of discretion,

therefore, IT IS ORDERED that the judgment of the Justice Court is affirmed." (Id.).

When the Petitioner sought relief in the Court of Appeals for the State of Arizona, that court dismissed the action as it lacked any jurisdiction to hear the Petitioner's appeal. (Court of Appeals Order, May 4, 1992). When the Petitioner petitioned the Arizona Supreme Court for review, that court denied review. (Supreme Court of Arizona Order, August 10, 1992). No Motion for Reconsideration of the denial was filed in the Court of Appeals, and when the time for doing so expired, the Court of Appeals reaffirmed its order dismissing the action. (Court of Appeals Order, August 26, 1992).

SUMMARY OF ARGUMENTS

I.
This Court Should Deny Review Because The Petitioner Seeks Review of Specific Factual Evidentiary Findings.

Unless there is no evidence at all to support factual determination, precedent prevents the Supreme Court from reviewing alleged incorrect factual findings.

II.
This Court Should Deny Review Because The Petitioner Seeks Review of Concurrent Factual Findings of Two Lower Courts.

Absent a very obvious and exceptional show of error in a factual determination, precedent prevents the Supreme Court from reviewing the concurrent findings of two lower courts.

III.
This Court Should Deny Review As The Petitioner Seeks Review of Matters Settled By This Court In South Dakota v. Neville, and Caplin & Drysdale v. United States.

This Court has decided that a refusal

to take a blood-alcohol test in a Driving Under the Influence of Alcohol case is admissible at trial and is not a violation of the Miranda doctrine. This is because the Court has mandated that the request is not considered interrogation under Miranda but is activity normally attendant to arrest and custody. This Court has also decided that although indigent defendants have a right to appointed counsel, they do not have a right to counsel of choice. Therefore, the issues the Petitioner presents have already been settled by this Court, and precedent prevents this Court from reviewing this petition.

IV.
This Court Should Deny Review As The Issue of Right To Counsel Was Not Properly Raised Below.

This Court will not consider issues not properly raised and addressed in

courts below as it must have a reviewable record from which to make its determinations. The Petitioner did not sufficiently raise the issues regarding counsel in the lower court and therefore this Court does not have an adequate record to review.

V.
This Court Should Deny Review As The Petitioner Failed To Provide This Court With Special And Important Reasons Why This Court Should Grant Review.

Rules of this Court require the Petitioner to provide special and important reasons why the Court should grant review. The Petitioner has offered no such reasons, but merely claims his rights were violated.

VI.

This Court Should Deny Review As The Petitioner Raises Issues In Argument Not Addressed In The Questions Presented For Review, And His Petition Is Inaccurate and Unclear.

Rules of this Court require the Petitioner to clearly set forth the questions to be reviewed and make argument regarding only these questions presented. Otherwise the Court will not consider them. The Petitioner addresses issues in argument not presented in his questions. He writes an inaccurate, unclear brief from which argument cannot be taken, and argues issues never properly raised in the lower court. Therefore the Petition is not suitable for review as the Petitioner has failed to adequately frame and clearly raise issues as required by the Rules of this Court.

ARGUMENTS

I.
This Court Should Deny Review Because The Petitioner Seeks Review Of Specific Evidentiary Findings.

This Court does not ordinarily review specific evidentiary findings. In United States v. Johnston, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925), this Court mandated: "We do not grant a certiorari to review evidence and discuss specific facts." 268 U.S. at 227. Justice Powell reiterated this dictate in United States v. Doe, 465 U.S. 605, 79 L.Ed.2d 552, 104 S.Ct. 1237 (1984) when the issue involved a United States District Court's ". . . determination of factual issues. See United States v. Nixon, 418 U.S. 683, 702, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974)." 465 U.S. at 614. This Court stated :

"Therefore, we will not overturn that finding unless it has no support in the record. Ibid." Id.

An example of a case where "no support" could be found in the record occurred in Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed. 654, 80 S.Ct. 624 (1960), where the case ". . . turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 U.S. at 199. Where there is no evidence to support the conviction, Due Process mandates its reversal. Id. In Thompson, the evidence showed the defendant was dancing in a restaurant where he had permission to be and that he was argumentative when arrested. Id., at 200. There was no evidence at all of the crimes

of loitering and disorderly conduct adduced in court and this Court overturned the convictions. Id., at 206.

In this case, however, the record clearly shows that Judge Girard had made a factual determination with ample support in the record. The judge heard testimony at the evidentiary hearing from the arresting officer that the Petitioner never asked for counsel. The judge made that specific factual finding. She denied the Petitioner's motion to suppress based on alleged Miranda violations and found that no interrogation occurred. The judge allowed the evidence of the refusal to take a blood-alcohol test to come into evidence.

The Petitioner asks this Court to review those specific factual findings,

and thus no grounds for review. There is support in the record, however, for these findings. The Respondent prays this Court will deny such a request as contrary to its precedent.

II.
This Court Should Deny Review Because The Petitioner Seeks Review of Concurrent Factual Findings of Two Lower Courts.

Hand-in-hand with the policy in Respondent's first argument is its second: that this Court will not review concurrent findings of two lower courts. The Court must not disturb the factual determinations of the lower courts since there is support in the record for the respective courts' findings.

The precedent for this Court to deny the petition for certiorari is set down in Graver Tank & Mfg. Co. v. Linde Air

Products Co., 336 U.S. 271, 93 L.Ed, 672, 69 S.Ct. 535 (1949). This Court stated: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. [citations omitted]." 336 U.S. at 275. The following Supreme Court cases have reaffirmed this precedent: Berenyi v. Immigration Service, 385 U.S. 630, 17 L.Ed.2d 656, 87 S.Ct. 666 (1967); Branti v. Finkel, 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980); United States v. Doe, 465 U.S. 605, 79 L.Ed.2d 552, 104 S.Ct. 1237 (1984); and NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 82 L.Ed.2d 70, 104 S.Ct. 2948 (1984).

The Honorable Emojean Girard denied the Petitioner's motion to suppress the refusal to take a blood-alcohol test and to suppress statements. The Petitioner appealed to the Pima County Superior Court where the Honorable John F. Kelly reviewed his appeal. After having reviewed the transcripts and briefs, Judge Kelly denied the appeal and found that there was substantial evidence to support the jury's verdict and Judge Girard's decision to deny the motions to suppress. He found the Judge Girard's determinations to be (1) not illegal and (2) not an abuse of discretion.

Since there are concurrent factual findings by two lower courts, this Court must deny the writ of certiorari. There is no very obvious and exceptional error

in the determinations, Graver, supra, and the Petitioner has failed to demonstrate any. The evidence shows an intoxicated driver was stopped with good cause, that he was given Miranda warnings, and made no statements. The evidence showed the Petitioner never asked for counsel. No evidence was offered to the contrary. The Petitioner's bald assertion during argument to the contrary has no weight since there is no support in the record for his claims.

III.
This Court Should Deny Review As The Petitioner Seeks Review of Matters Settled By This Court In South Dakota v. Neville, And Caplin & Drysdale v. United States.

The Petitioner's first three questions presented would appear to involve the same issue; namely, whether the trial court abused its discretion in finding that

there was no violation of Miranda v. Arizona, supra? No incriminating statements of the Defendant were introduced at trial as none were ever made. The refusal to take the intoxilyzer, however, was admitted at trial. Judge Girard also found that the Petitioner never requested counsel. She denied his motion to suppress.

This Court has already addressed the issue of whether such a refusal to take a blood-alcohol test is admissible at trial. In South Dakota v. Neville, 459 U.S. 553, 564, 74 L.Ed.2d 748, 103 S.Ct. 916 (1983), Justice O'Connor expressed the Court's opinion: "We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the

officer, and thus is not protected by the privilege of self-incrimination." In Footnote 15 to the opinion's holding, the Court reasoned that the question by police whether a suspect will submit to a blood-alcohol test is not an interrogation within the meaning of Miranda. Id. The request to take a blood-alcohol test is "normally attendant to arrest and custody" and therefore falls outside of the Miranda prophylactic parameters. Id.

In this case, therefore, the Court has already addressed the issue sought by Petitioner for review and has resolved the question against the Petitioner's favor. His claim that the trial court abused its discretion in finding that there was no Miranda violation, is specifically rejected in South Dakota v. Neville, and

this issue need not be revisited. Even if the Petitioner had asked for counsel, the Neville ruling brings into doubt whether that fact alone would have served to preclude such non-testimonial evidence.

The last question presented by the Petitioner goes to whether his counsel was inadequate and whether his objection to not being appointed counsel of choice will suffice to require a reversal of conviction. In Caplin & Drysdale v. United States, 491 U.S. 617, 105 L.Ed.2d 528, 109 S.Ct. 2667 (1989), this Court held that: "Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose counsel. The Amendment guarantees defendants in criminal cases the right to adequate

representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." 491 U.S. at 624. Thus the Petitioner's claim that he was entitled to counsel of choice is clearly without merit.

There is no application for counsel based upon indigency in the court's file and it would appear that Judge Gibson of the Pima County Justice Courts acted upon his own initiative in appointing Mr. David Bruce on behalf of the Petitioner on July 12, 1990. The record is silent as to the reason. It would appear that Judge Gibson appointed counsel for the Petitioner to use as he wished in assisting his defense. (TMH, p. 4). Assuming arguendo that the

Petitioner was entitled to legal representation on the DUI charge due to his indigency, the Caplin & Drysdale opinion clearly states that impecunious defendants do not have the right to counsel of choice. Therefore the issue has been addressed by this Court and no redetermination is warranted. Again, assuming arguendo that the Petitioner was given a "free" lawyer, the issue is moot because the Petitioner could choose to use Mr. Bruce as he wished or to hire his own lawyer. Choice, then, is not at issue. The Petitioner cannot prevail on his claim and in any event because he did choose to utilize Mr. Bruce's services both at the evidentiary hearing and at trial. The Respondent prays this Court not to grant review of this issue already decided.

IV.
This Court Should Deny Review As The Issue Of Right To Counsel Was Not Properly Raised Below By Petitioner.

In Tacon v. Arizona, 410 U.S. 351, 35 L.Ed.2d 346, 93 S.Ct. 998 (1973), in a per curiam decision, the Court dismissed a writ of certiorari as improvidently granted when it realized that an issue within the brief was "not raised by the petitioner below nor passed upon by the Arizona Supreme Court." 410 U.S. at 352. The Court stated: "We cannot decide issues raised for the first time here. [citation omitted]." Id. The Court further reasoned that because the remaining issue was primarily a factual issue, which by itself did not warrant granting of certiorari jurisdiction, the writ must be dismissed. Id. Similarly, this petition for certiorari must also be

dismissed.

In order to make a determination of ineffective assistance of counsel, the lower court must apply the standard enunciated in Strickland v. Washington, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984), wherein the proponent of the ineffectiveness claim must show that his counsel's performance was deficient and below an objective standard of reasonableness, and that this deficient performance prejudiced the proponent.

The record from the Justice Court is devoid of any reference to a resolution of the issues regarding ineffective assistance of counsel or counsel of choice. There was no such resolution requested by the Petitioner.

Normally an ineffective assistance of

counsel claim is addressed in a petition for post-conviction relief. (Rule 32, Arizona Rules of Criminal Procedure). The Petitioner did file such a petition but directed his prayers for relief to matters aside from any ineffective assistance of counsel claim. There is no record of any objection regarding "counsel of choice" in the Justice Court.

The first time that the Petitioner asked for a determination of these issues was in his Appellant's Opening Brief, filed in the Pima County Superior Court on December 16, 1991. The Court cannot review an inadequate record and cannot review issues when they are raised for the first time in appellate pleadings. Review of these issues is not proper because of the Petitioner's failure to raise issues

below. The Respondent would urge this Court to follow the precedent set forth in Tacon, supra, and dismiss the petition for certiorari.

V.
This Court Should Deny Review As The Petitioner Failed To Provide The Court With Special And Important Reasons Why The Court Should Grant Review

Rule 10.1 of the Rules of the United States Supreme Court provides in part: "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The Petitioner's only jurisdictional statement is "The court has jurisdiction in this case as it involves the violation of the Petitioner's Fourth, Fifth and Sixth Amendment rights secured

by the Constitution of the United States." (Petitioner's "Petition for Writ of Certiorari to the United States Court of Appeals", p. 12.).

The Respondent urges this Court to dismiss the petition as the Petitioner has advanced no special and important reasons why the Court should exercise its discretionary jurisdiction. There is no legal controversy to resolve among the various Federal and State courts. There is no extraordinary, shocking or disturbing result in this case. There is no unsettled question of law which warrants the granting of the petition. The Petitioner has failed to advance any reasons for this Court to grant jurisdiction and only raises empty and unsupported claims that his rights were

violated. Judicial economy warrants this petition's dismissal.

VI.
This Court Should Deny Review As The Petitioner Has Addressed Issues In Argument Not Presented In The Questions Presented For Review, And Is Inaccurate And Unclear.

Rule 14.1(a) of the Rules of the United States Supreme Court provides in part that: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." The Petitioner has presented four questions concerning the constitutionality of the lower court's denial of certain motions and the lower court's treatment of the Petitioner's claim of ineffective assistance of counsel and counsel of choice.

In his arguments section, the Petitioner raises issues not addressed in

his questions presented. These issues are not fairly included in the brief as they are an inaccurate and unclear presentation on the law. The Petitioner's argument is set forth in a confusing manner, and his arguments that he was denied due process and equal protection are superficial and legally unsupported.

Finally, Respondent's arguments in sections I through V of this brief contain challenges to factual determinations and concurrent holdings of two lower courts. Both of these situations may not form the basis of granting review. He also raises issues already settled by this Court in precedent. Some claims were only first raised on appeal to the Pima County Superior Court and there is no adequate Justice Court record upon which this Court

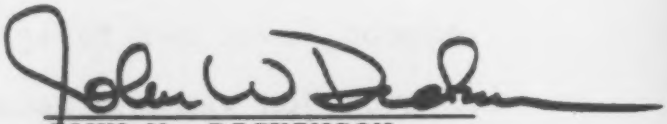
can grant review. Lastly, the Petitioner seems to address issues affecting only State law and regarding which there are no federal issues.

Since the arguments are not addressed in the questions presented nor are they fairly included in the Petitioner's argument, these issues are not properly raised and must not form the grounds upon which this Court grants the petition.

CONCLUSION

This Court should dismiss the petition for a writ of certiorari. The Petitioner has given the Court no reason to exercise its discretionary jurisdiction. His arguments present no issues this Court must resolve in the interest of Justice.

WHERETOFORE, the Respondent prays this Court will dismiss the writ of certiorari and refuse to exercise its discretionary jurisdiction over this matter.



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